



In the Shadow of Politics: Victim Participation in the Kenyan ICC Cases - New IW Research Report

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Research Report

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Author

Dr. Thomas Obel Hansen

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Cover Photo: ICC-CPI. Representatives of the Office of the Prosecutor and Legal Representatives of Victims at the beginning of the Status Conference in the Kenyatta case on 8 October 2014.

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Acronyms

ASP	Assembly of States Parties (of the ICC)
AU	African Union
CBO	Community-based organisation
CSS	Counsel Support Section (of the ICC)
ICA	International Crimes Act (of Kenya)
ICD	International and Organised Crimes Division (of Kenya)
ICPC	International Center for Policy and Conflict
ICTJ	International Center for Transitional Justice
IW	Impunity Watch
KES	Kenya Shilling
KNDR	Kenyan National Dialogue and Reconciliation
KPTJ	Kenyans for Peace with Truth and Justice
LRV	Legal Representatives for Victims
NGO	Non-governmental organisation
OPCV	Office of the Public Counsel for Victims (of the ICC)
PIDS	Public Information and Documentation Section (of the ICC)
RPE	Rules of Procedure and Evidence (of the ICC)
SGBV	Sexual and gender based violence
TJ	Transitional justice
TJRC	Truth, Justice, and Reconciliation Commission (of Kenya)
VPRS	Victims Participation and Reparations Section (of the ICC)

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1. Introduction

1.1 Purpose of the study

Since the Nuremberg trials, recourse to transitional justice (TJ) as a response to serious violations of international law has become the norm rather than the exception (Teitel, 2002). Seeking the truth about the past, holding the perpetrators of violence to account, reconciling divided groups and (re-)establishing peace is deemed vital for victims, affected communities, and for the future of both state and society. To achieve these goals, institutionalised mechanisms such as truth commissions and criminal tribunals have often been relied upon. And as the practice of TJ has gradually evolved, novel approaches and new principles have been accorded greater importance. Victim participation is one such example, representing both an approach and a principle.

As Impunity Watch has outlined in a previous study, victim participation has without doubt changed the way that policymakers and practitioners conceive of TJ.¹ In its absence it is assumed that TJ will be detached from affected communities, will face difficulties in generating local ownership and grassroots impact, and will fail to address the grievances of the victims of serious crimes under international law. In his first report, the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence therefore refers to ‘meaningful participation’ of victims as a *sine qua non* for providing recognition, fostering trust and strengthening the rule of law as components of a ‘victim-centred approach’ to TJ (UN Doc. A/HRC/21/46). The report moreover recommends that, ‘[n]one of the proclaimed goals [of TJ] can happen effectively with victims as the key without their meaningful participation.’

Nevertheless whilst the benefits of participation appear self-evident – victim participation having become an axiom of TJ – there is still little evidence to support many of the supposed benefits of participation or indeed to understand its full implications. For example, whilst a number of important empirical studies provide a fuller picture of participation in practice (e.g. Hoven, 2013; Tenove, 2013; Pham et al., 2011; Stover et al., 2011), these studies remain in the minority when compared to their theoretical or technical-legal counterparts. Added to this, the darker side of participation, including potentially damaging consequences for victims, affected communities and TJ mechanisms, is under-explored. There is a real risk that without better comprehension of the dynamics of victim participation on the ground, this core component of TJ policymaking may become a hollow principle or an empty ritual.

This Report forms part of a broader Research Project undertaken by Impunity Watch (IW), which aims at examining the key assumptions that have been made about victim participation, thereby enabling practitioners and policymakers to provide meaningful support to the active participation of victims in TJ. The overall objective of this Report is to provide empirical evidence to inform better policymaking on TJ. Ultimately, this is hoped to support the positive impact that TJ mechanisms may have for victims and affected communities.

This specific Report examines victims’ participation in the Kenyan ICC cases. The additional country studies in this comparative research project, namely Burundi, Cambodia, Guatemala, Honduras and Tunisia,

¹ This introduction draws on the IW Discussion Paper that was the first publication from the comparative research project which also included the present study. This Paper, *Victim Participation in Transitional Justice Mechanisms: Real Power or Empty Ritual?*, was written by David Taylor in 2014, and is available at http://www.impunitywatch.org/docs/IW_Discussion_Paper_Victim_Participation1.pdf. The references to studies in this introduction relating to victim participation are also to be found in the Discussion Paper.

examine victim participation in other TJ mechanisms, including criminal tribunals and truth commissions. As such, the goals of IW's comparative country research include:

- Researching and documenting how a sample of victims and affected communities experience participation in TJ mechanisms
- Analysing the perceptions of these victims and affected communities of participation, including their views and expectations, identifying the meaning and significance of participation and non-participation
- Producing a broad picture of how victim participation is experienced in practice, including by non-participating victims, formulating advice for practitioners and policy recommendations
- Contributing to greater comparative understanding of the dynamics and effects of victim participation in TJ as experienced by victims and affected communities

However, as discussed just below, due to the security situation in Kenya at the time of the research, these terms of reference were modified for this particular Report, as the experiences and perceptions of victims could not be assessed directly through interviews and focus groups with victims themselves due to this security situation. Instead, as explained below, the present Report relies on a combination of desk studies and interviews and consultations with a range of experts, including the ICC Legal Representatives for Victims (LRVs) in the Kenyan cases; non-governmental organisation (NGO) experts that are familiar with the situation and the preferences of victims; and representatives of community-based organisations (CBO) who work with victims on a daily basis in local communities.

While some existing studies have examined issues relating to victim participation in the Kenyan ICC cases (e.g. Tenove, 2013), the present Report adds to the literature on the topic by undertaking a broad survey of the view of stakeholders concerning the benefits and challenges of the particular regime for victim participation adopted in the Kenyan ICC cases and by contextualising these findings to perceptions in the literature. In this way, the Report not only aims at enhancing our understanding of how the victim participation regime has worked in the specific case of Kenya, but is also aims to provide a platform for understanding issues relating to victim participation which will be relevant for policy-makers and practitioners working on victim participation in other contexts and TJ more broadly.

1.2 Methodology and limitations

In principle, the methodology used for this Report relies on the IW research framework developed on the basis of the IW Discussion Paper authored by Taylor entitled *Victim Participation in Transitional Justice Mechanisms: Real Power or Empty Ritual?* (hereinafter 'Taylor, 2014'), according to which 'a mixed-method approach, principally utilising in-depth qualitative interviews and focus groups with victims and affected communities' was to be utilised. These principal methods were to be complemented by interviews with practitioners, policymakers and experts, as well as a country-specific literature review.

However, due to security concerns in Kenya, which became increasingly clear following the conclusion of a security assessment in April and May 2014, IW and the author of this Report agreed to alter the methodology. The security assessment, which was based on consultations with Kenya-based experts and NGO staff concluded that the 'current situation in Kenya presents significant security challenges for undertaking any type of research that involves interviews/ direct consultations with victims of the post-



election violence’.² Accordingly, since conducting interviews and focus groups with victims would have been associated with unacceptable risks, it was decided that the Report would instead rely on a combination of desk studies and field work involving interviews with experts and NGO representatives with expert knowledge of the situation and perceptions of victims in Kenya. Furthermore, a workshop was conducted involving representatives of CBOs working with victims in the field on a daily basis. While the decision not to directly consult victims is associated with some challenges understanding their views and perceptions, it would have been unethical to endanger the security of victims. The security situation in Kenya at the time of conducting this research points to some key challenges associated with victim participation in a highly politicised case such as Kenya, issues which are elaborated further below.

In creating the interview questions as well as the themes and discussion points for the workshop, this Report takes its starting point in the research hypotheses and questions developed by IW, based on the findings of the above-mentioned IW Discussion Paper. In that paper, the following hypotheses were identified:

- More empirical evidence is needed: (a) on the ‘virtues’ of participation; and (b) whether, and how, participation leads to the benefits that are commonly assumed
- Participation can take different forms during the lifespan of a TJ mechanism; more information to understand the basic ‘enabling conditions’ for participation is needed
- Representation, indirect participation and notification *are* forms of participation
- Victim participation has inflated expectations, and has simultaneously divided and homogenised victims
- Information and outreach are crucial for meaningful victim participation
- To make it meaningful, victims’ participation in a TJ mechanism should be complemented by other measures and processes

Additionally, the IW Discussion Paper established a number of research questions, which have provided overall guidance to the development of interview questions and a workshop agenda in the context of the present research relating to victims’ participation in the Kenyan ICC cases. The interview guide containing these questions and the agenda for the workshop with victim organisations are attached as Annexes to this Report. The interviews were conducted as semi-structured, meaning that respondents’ answers to specific questions informed the chronology as well as substance of other questions. All respondents formally consented to being interviewed, having the options of a) being identified by name and title; b) being identified by generic title only; and c) not having his/ her identity disclosed in any way. A copy of the consent form is attached as an Annex to this Report.

The interviews and workshops were carried out in June 2014, and the Report was concluded in November 2014, with an initial post-script drafted in February 2015. Following the conclusion of the research, important developments relating to the Kenyan ICC cases have taken place. Importantly, when this Report was edited in May 2016 all of the cases relating to the 2007/8 post-election violence had collapsed, either because the Prosecutor had withdrawn charges or because the Trial Chamber had decided to vacate the

² Security assessment relating to IW field research in Kenya, 16 May 2014 (on file with author).

proceedings. These developments, which are described in further detail the post-script to this Report, have significant ramifications for the victims of the post-election violence and hence also the findings of this Report. The developments relating to the ICC cases occurring from the time this Report was commissioned until its publication indicate the challenges associated with addressing the subject of victim participation in a reflective way in such a contentious and dynamic case as that of the ICC in Kenya.

As mentioned above, a substantial part of this Report was drafted in November 2014, with an initial post-script drafted in February 2015. Subsequent events (up till May 2016) relating to the Kenyan ICC cases are discussed in the post-script. During the revision of the Report in May 2016, the findings of some key studies on victim participation published since November 2014 have been integrated in the Report.



2. The Process of Seeking Accountability and Redress for Victims of the Post-Election Violence

2.1 The post-election violence and its victims

Following a disputed presidential election in December 2007, where both incumbent president Mwai Kibaki (PNU political party) and his challenger Raila Odinga (ODM political party) claimed victory, large-scale violence erupted in Kenya, in particular in the Rift Valley and Nairobi slums. During the course of a few weeks, more than a thousand Kenyans were killed, many more were raped and injured and hundreds of thousands were displaced (CIPEV, 2008). What started as spontaneous protests and rioting by Odinga supporters in Nyanza Province, soon took a more organised form. This included premeditated attacks committed by armed youth groups against members of ethnic groups seen to support Kibaki as well as revenge attacks committed by the Mungiki gang and other youth groups against members of ethnic groups perceived to be Odinga supporters. The Police was also responsible for many of the deaths, especially in opposition strongholds. The Waki Commission, set up by the Government to investigate the PEV, came to the conclusion that Police shootings were the cause of approximately one-third of the total casualties (CIPEV, 2008: 305). Human Rights Watch similarly found that ‘heavy-handed police enforcement of the protest ban, including the use of excessive force, claimed hundreds of Kenyan lives, often in circumstances where the police’s use of lethal force was unjustified’ (HRW, 2008: 24). Much of the violence took place in an organised manner, having been planned in advance of the elections by political leaders. Human Rights Watch, for example, observes that ‘[i]n many cases the chief architects of post-election violence were prominent and well-known individuals’, including politicians, counsellors and business people (HRW, 2008: 38-39).

The PEV was often carried out in very brutal ways. One of the most well-known scenes of the PEV occurred in Kiambaa in the Rift Valley, where a mob set fire to a church where Kikuyu residents had sought refuge. According to Human Rights Watch, at least 30 people were burned alive (HRW, 2008: 41). The Waki Commission reported on the nature and scope of sexual and gender based violence (SGBV), noting that there are ‘tales of family members being forced to stand by and witness their mothers, fathers, sisters, brothers, and little children being raped, killed, and maimed’ (CIPEV, 2008: 237). As a consequence of SGBV, husbands often abandoned their wives who had been defiled (CIPEV, 2008: 237). However, as noted by ICPC (2011), men were also frequently subjected to sexual violence during the PEV crisis. Many of the SGBV victims did not formally report their experiences of sexual violence, out of fear of being attacked again, expectations that nothing would be done, because they were not able to identify the perpetrator or simply because they did not know where and how to report the crimes (CIPEV, 2008: 246-47).

There is a level of uncertainty concerning the death toll of the PEV. The Kenyan Police reported 616 deaths during the PEV crisis (CIPEV, 2008: 306). However, the most commonly cited figure is that of the Waki Commission, which concluded that in the period of 27 December 2007 to 29 February 2008, 1,133 Kenyans lost their lives as a direct result of the PEV (CIPEV, 2008: 305). The district with the highest reported number of deaths is Uasin Gishu in the Rift Valley with 230 killings, followed by Nakuru, also in the Rift Valley, with 213 reported killings. The Rift Valley Province was also, by far, the Province with most reported deaths (744 killings) (CIPEV, 2008: 308). The most common causes of death were gunshots, sharp pointed objects and

burns (CIPEV, 2008: 312). During the PEV, there was also widespread destruction of residential homes, private businesses and government property (CIPEV, 2008: 337-41).

The PEV also led to mass displacement. According to the Waki Commission, 350,000 persons were displaced as a direct result of the PEV (CIPEV, 2008: 272). Most IDPs left their homes under emergency conditions not knowing their ultimate destination. The IDPs fled to the nearest places they considered safe, including churches, trading centres, chief's camps and police stations, but were sometimes subject to additional attacks in these locations (CIPEV, 2008: 275-277). More permanent IDP camps were later set up, but without much planning and with insufficient security measures (CIPEV, 2008: 277-82). In January 2008, the Ministry for Special Programmes established the Mitigations and Resettlement Department, and in April 2008, the Government started an operation aimed at encouraging IDPs to return to their homes. As part of the efforts, payment of 10,000 Kenya Shilling (KES) (approximately 120 USD) were made to persons leaving the camps; provisions of transport to home areas were made; and some were given building materials to rebuild their houses. As of 8 July 2008, around 200,000 IDPs had been resettled (CIPEV, 2008: 289-290). However, several years after the PEV had ended many IDPs remained in the camps (Refugee Consortium of Kenya, 2013). Several studies have commented critically on the Government's resettlement efforts. ICPC (2012: 21), for example, notes that 'the government began IDPs resettlement with a rushed push to return IDPs to their original areas of residence from which they had been displaced', concluding that the initiative was 'poorly conceived, uncoordinated and unsuccessfully executed'. ICPC (2012: 21-22) further observes that the operation 'failed to address the concerns and wishes of the displaced persons and only served to re-victimize the IDPs by forcing them to return to the areas of their original violation without credible security guarantees'.

There were various causes of the PEV, including political manipulation of ethnicity; a 'winner-takes-it-all' understanding of elections; too strong executive powers and lack of checks-and-balances; various rule of law problems, such as a corrupt judiciary and police force; a legacy of impunity, which includes a failure to hold to account the organisers and perpetrators of earlier rounds of political violence; and socio-economic problems, including a high level of poverty and inequality and disputes over land (Mueller 2008; Hansen, 2009).

2.2 Attempts at pursuing accountability and redress for victims at the national level

During the PEV crisis, various attempts were made to bring Kibaki and Odinga to the negotiation table. As it became clear that a nationally brokered solution was unviable, Archbishop Desmond Tutu of South Africa and other international authorities attempted to mediate between the parties to the dispute. However, Kibaki and Odinga initially refused to engage in dialogue, the former insisting he was the democratically elected president and the latter claiming the elections had been rigged and his victory stolen (Lindenmayer & Kaye, 2009: 4). However, on 8 January 2008, Ghanaian President John Kufuor, in his capacity as Chairman of the African Union (AU), announced the establishment of an AU Panel of Eminent African Personalities to facilitate a resolution of the crisis (McGhie & Wamai, 2011: 15-16). Kufuor approached Kofi Annan, who agreed to chair the panel, which also came to include former Tanzanian President Benjamin Mkapa and former First Lady Graca Machel of Mozambique (Griffiths, 2008: 3).

The AU Panel initiated a mediation process known as the 'Kenyan National Dialogue and Reconciliation' (KNDR). There were two overall objectives of the KNDR: 1) to bring about a political resolution in order to end the violence; and 2) to facilitate a dialogue to address the longer term structural problems in Kenya



that had enabled the PEV. The first objective was achieved on 28 February 2008 when Kibaki and Odinga signed a power-sharing agreement, whereby Kibaki would remain the President and Odinga become Prime Minister (a post created in the context of the KNDR). Concerning the second objective, the parties to the KNDR agreed to establish several mechanisms aimed at addressing the PEV and Kenya's legacy of political violence, most notably a criminal justice process; a Truth, Justice, and Reconciliation Commission (TJRC); and a constitutional review process (Hansen, 2013).

The parties also agreed to create the 'Commission Investigating the Post-Election Violence' (usually referred to as the 'Waki Commission', after the name of its chairman, Justice Philip Waki), mandated to investigate the violence and make recommendations with regard to the prosecution of PEV crimes. The Waki Commission recommended the establishment of a so-called Special Tribunal, to be composed of Kenyan as well as foreign lawyers, to try those most responsible for the PEV crimes. The Commission handed over to Annan a sealed envelope with the names of those it deemed most responsible for the PEV, which was to be forwarded to the ICC Prosecutor if the Kenyan Government failed to act on the recommendation to establish the Special Tribunal (Sriram & Brown, 2012). Following intense debate about the various accountability options, on 12 February 2009, the Kenyan parliament voted down a bill concerning the establishment of a Special Tribunal to deal with the PEV crimes. Many of the members of parliament who opposed this opportunity to establish a local accountability process cited problems with judicial independence in Kenya and emphasised their preference for conducting the trials in The Hague (Hansen, 2011). For example, following the defeat of the February bill, William Ruto – who was later charged by the ICC – argued that 'Kofi Annan should hand over the envelope that contains names of suspects to the International Criminal Court at The Hague so that proper investigations can start' (Nation, 2009). Kenya never created the Special Tribunal, and as discussed in further detail below, on 31 March 2010 the ICC announced the formal opening of an investigation into the Kenyan situation.

Following the opening of the ICC investigation, various proposals have again been considered for prosecuting PEV crimes at the national level. Notably, in January 2011, in the context of the Kenyan Government's efforts to gather support for a UN Security Council deferral of the Kenyan ICC cases, the Government proposed to create an International and Organised Crimes Division (ICD) of the Kenyan High Court. As of November 2014, the ICD proposal is yet to be implemented (see below in the post-script on later developments). While many Kenyans, including civil society groups, are in principle supportive of establishing a complementary accountability process, the ICD proposal is seen as flawed by many observers. In particular, it is argued that the ICD is intended as a way for the Government to further undermine the ICC cases, rather than advancing accountability for PEV crimes. Critics also suggest that the proposed ICD has too broad a jurisdiction as it focuses on a variety of crimes that are not normally considered international crimes (such as poaching, dumping, terrorism and corruption); that the ICD lacks efficient support mechanisms, especially in terms of strong and independent investigatory and prosecutorial mechanisms; and that it has poor mechanisms for witness protection and support (Hansen & Sriram, 2015).

Besides these attempts at pursuing criminal accountability at the national level, various processes aimed at addressing the PEV and other serious crimes have been established in Kenya. As noted above, the Kenyan leadership agreed to create the TJRC in the context of the KNDR. The Commission, which was set up through an Act of Parliament, focused on politically motivated violence, assassinations, community displacement, settlements and evictions as well as major economic crimes, historical land injustices and illegal or irregular land acquisition and other 'historical injustices'. The TJRC was mandated to investigate crimes and injustices

committed from 12 December 1963 (the time of independence) till 28 February 2008 (the end of the PEV).³ On paper, Kenya's TJRC complies with international standards relating to truth-seeking. However, commentators argue that the political leadership undermined the Commission's integrity. In part this happened by the Government failing to provide the Commission with the necessary financial resources.⁴ Equally important, the process of appointing the commissioners was compromised: In late July 2009, President Kibaki announced that Ambassador Bethuel Kiplagat would be appointed as chairman of the Commission, although credible information had been tabled pointing to Kiplagat's involvement in serious human rights violations (Hansen, 2013: 314-16). The fact that information concerning Kiplagat's alleged role in serious human rights violations was publically available prior to his appointment as chair of the TJRC suggests that political leaders deliberately attempted to undermine the TJRC's integrity. As noted by former Vice Chair of the TJRC, Betty Murungi, political forces have 'promote[d] a non-performing, un-resourced TJRC with little or no capacity to find the truth but to keep it alive nonetheless so that it can be buried forever' (Otieno, 2014). Partly due to these controversies, the TJRC has had little appeal to the victims of human rights abuses in Kenya. A 2009 survey showed that many victims (around 23 %) had never heard of the TJRC, and those who have generally lack confidence in the process (only 9 % of the victims consulted said they had faith that the TJRC could address their demands) (ICTJ, 2009: 43-44).

In its published report, the TJRC recommended that Kenya's National Assembly should adopt a framework for reparations to victims in Kenya, including the victims of the PEV. The following provides an overview of the Commission's recommended framework for reparations (TJRC, 2013: 105):

Category of Violation	Priority A – Most Vulnerable	Priority B – Collective Reparations	Priority C – Individuals, Non- expedited
1. Violations of the Right to Life	Victims in this block are eligible for pensions, medical & psychosocial vouchers.	Victims in this block are eligible for land reparations, socio-economic measures, government policy interventions, as well as non-material reparations such as restitution of rights, recognition, self-determination measures, and memorials.	Victims in this block are eligible for standardised pensions.
2. Violations of Personal Integrity, including SGBV			
3. Forcible Transfer of Populations	If a victim died as a direct result of conditions of displacement, family can claim reparations as above.		
4. Historical and Contemporary Land Injustices	These violations can only be eligible for reparations under Priority B.		
5. Systematic marginalisation			

³ Truth, Justice, and Reconciliation Commission Act no. 6 of 2008.

⁴ In 2011, the TJRC itself stated that 'perhaps the single greatest challenge that the Commission has faced since its inception is the lack of sufficient finances and resources to [run] its operations'. See Truth, Justice and Reconciliation Commission (TJRC), Progress Report to the National Assembly Submitted Pursuant to Section 20(3) of the Truth, Justice and Reconciliation Act No. 6 of 2008 (24 June, 2011), 39–40.



At the time of writing this Report, the Government was yet to implement these recommendations and it is unclear whether it will do so in the future. More generally, the Kenyan Government has failed to provide many PEV victims with compensation and other forms of reparation, notwithstanding that international human rights standards stipulate that victims of serious human rights abuses are entitled to reparations (AI, 2014: 8).

Due to the challenges associated with pursuing criminal accountability and redress for victims, Kenyan civil society groups have brought civil suits against the Government for failing to fulfil its obligations under international and national law during the PEV crisis. At the time of writing this Report, cases relating to Police shootings, IDPs and SGBV were pending before the Kenyan High Court (Hansen & Sriram, 2015).

2.3 The ICC process

On 26 November 2009, the ICC Prosecutor, relying on the *proprio motu* powers under Article 15 of the Rome Statute, requested authorisation from the Pre-Trial Chamber to open an investigation into the Situation in Kenya, which was authorised by the Chamber on 31 March 2010.⁵ In March 2011, Pre-Trial Chamber II issued summonses to appear for a total of six suspects: William Samoei Ruto (Ruto), Henry Kiprono Kosgey (Kosgey), Joshua Arap Sang (Sang), Uhuru Muigai Kenyatta (Kenyatta), Francis Kirimi Muthaura (Muthaura) and Mohammed Hussein Ali (Ali).⁶ However, the Pre-Trial Chamber only confirmed the charges for Ruto, Sang, Kenyatta and Muthaura.⁷ Following the Prosecutor's application to this effect, in March 2013, Trial Chamber V, by majority with Presiding Judge Ozaki dissenting, decided to withdraw the charges against Muthaura and ordered that the proceedings against Muthaura be terminated due to insufficient evidence.⁸

Accordingly, as of November 2014, there were two on-going ICC cases arising out of the PEV: Case 1 against Ruto and Sang and Case 2 against Kenyatta (see below in the post-script on later developments). Ruto is charged as an indirect co-perpetrator pursuant to Article 25(3)(a) of the Statute, and Sang as having otherwise contributed to the commission of crimes within the meaning of Article 25(3)(d), with three counts of crimes against humanity, including murder, deportation or forcible transfer of population and persecution.⁹ Kenyatta is charged as an indirect co-perpetrator under Article 25(3)(a) of the Statute for the crimes against humanity of murder, deportation or forcible transfer of population, rape, persecution and other inhumane acts.¹⁰ Whereas the trial against Ruto and Sang commenced on 10 September 2013, as of November 2014, the Kenyatta trial was yet to commence (see below in the post-script on later developments). In fact, the Prosecutor had asked for the trial date to be postponed indefinitely, until additional requested evidence is received from the Kenyan Government.¹¹ In response to the Prosecution's admission that it has insufficient evidence to move to trial, the Kenyatta defence has requested a termination of the proceedings.¹² In light of these submissions, the Trial Chamber vacated the 7 October 2014 trial date without setting a new one and convened a status conference in early October 2014 to hear the parties' submissions.¹³ As of November 2014, the Chamber was yet to make a ruling on the applications,

⁵ ICC-01/09-19.

⁶ ICC-01/09-01/11-01; ICC-01/09-02/11-01.

⁷ ICC-01/09-01/11-373; ICC-01/09-02/11-382-Red.

⁸ ICC-01/09-02/11-696.

⁹ ICC-01/09-01/11-373.

¹⁰ ICC-01/09-02/11-382-Red.

¹¹ ICC-01/09-02/11-944.

¹² ICC-01/09-02/11-945-Red.

¹³ ICC-01/09-02/11-954.

and thus make a determination as to whether the Kenyatta trial will commence at all (see below in the post-script on later developments).

Besides the two cases arising out of the PEV, an arrest warrant was unsealed for Kenyan Journalist Walter Barasa on 2 October 2013 for offences against the administration of justice under Article 70 of the Statute relating to his alleged role in corruptly influencing witnesses in the Ruto and Sang case.¹⁴ However, as of November 2014, Barasa was yet to be transferred to the ICC.

The Kenyan cases have been surrounded by controversy, with the Kenyan Government and the African Union arguing that Kenyan leaders are being prosecuted for political reasons by a Court that they claim is driven by Western powers. These challenges to the Kenyan ICC cases – and more broadly the Court’s credibility and legitimacy – must be viewed in context of Kenyatta and Ruto winning the 2013 elections on a joint ticket, and African Union opposition to the prosecution of incumbent leaders. The previous government headed by Kibaki took various measures to end or undermine the ICC cases, and these efforts have intensified under the current Kenyan leadership (Campbell, 2013). Some of the most significant measures taken by Kenyan authorities since the ICC announced that an investigation into the Kenyan situation would be opened and up till November 2014 (see below in the post-script on later developments) include:

- On 22 December 2010, almost immediately following the ICC Prosecutor’s request to have the summonses issued, the Kenyan Parliament passed a motion requiring the Government to take action to withdraw from the Rome Statute. However, Article 127(1) of the Statute makes it clear that a possible withdrawal from the Rome Statute would not affect the country’s obligation to cooperate with the ICC concerning pending cases. The Kenyan Government chose not to take any action on Parliament’s motion (Hansen, 2011: 10-12).
- In early 2011, the Kenyan Government launched diplomatic efforts aimed at obtaining a UN Security Council deferral of the Kenyan ICC cases under Article 16 of the Statute. Following an African Union decision to support Kenya, on 8 February 2011 the Kenyan Government made a formal request to the Security Council for a deferral, arguing that the ICC process poses a ‘real and present danger to the exercise of government and the management of peace and security in the country’. The Security Council never acted on the request (Hansen, 2011: 12-13).
- On 31 March 2011, the Kenyan government filed an admissibility challenge pursuant to Article 19 of the Statute, which read together with Article 17 of the Statute makes it clear that the Court cannot exercise jurisdiction if a state with jurisdiction is investigating or prosecuting the case. With reference to the ‘fundamental and far-reaching constitutional and judicial reforms very recently enacted in Kenya’, the Government stated that the national courts would soon be able to prosecute PEV crimes. At the same time, the Government stated that domestic investigations had already commenced with respect to some of the ICC suspects. However, on 30 May 2011, Pre-Trial Chamber II rejected the admissibility challenge, finding that no credible information had been provided to show that Kenya was in fact investigating the ICC suspects. An appeal filed by the Government was rejected by the Appeals Chamber, which similarly found that there were no ongoing national proceedings relating to the ICC suspects (Hansen, 2012).
- On 2 May 2013, Kenya submitted a ‘note verbale’ to the UN Security Council members, in which it requested ‘an immediate termination of the case at the Hague without much further ado’. Among

¹⁴ 01/09-01/13-1-Red2.



others, the Kenyan Government argued that the ‘Prosecution abdicated its duty under Article 69 of the Rome Statute by failing to undertake investigations and brought before the Court testimonies made by coached witnesses’; that it would be a ‘miscarriage of justice to continue trying [the suspects]’; and that the ICC proceedings ‘are not in the interest of peace and security in Kenya and/ or the region’ (GoK, 2013). There is no legal basis in the Rome Statute for the UN Security Council to terminate ICC cases. The Council did not act on the Government’s termination request.

- In September 2013, the Kenyan Parliament passed another motion requiring the Government to withdraw from the Rome Statute and to repeal the country’s International Crimes Act (ICA), which domesticates the Rome Statute. Parliament’s move received significant attention, both within and outside of Kenya, but was not acted on by the Government (Kersten, 2013).
- In the run-up to the 2013 Assembly of States Parties (ASP), the Kenyan Government proposed an amendment of rules in the Statute governing presence at trial. While the Statute was not amended, the RPE were amended to, among other things, facilitate that an accused person who is subject to a summons to appear and ‘who is mandated to fulfil extraordinary public duties at the highest national level’ may be excused from presence at trial and be represented by counsel only (FIDH, 2013).

In addition to these attempts at terminating, delaying or altering the conduct of the accountability process, according to the ICC Prosecutor, Kenyan authorities have failed to cooperate with the Court, including failing to hand over evidence as requested by the Office of the Prosecutor.¹⁵ Whereas Kenyan authorities have reacted strongly to allegations of non-cooperation,¹⁶ the Trial Chamber has ordered Kenyan authorities to comply with the Prosecutor’s cooperation requests.¹⁷ As of November 2014, the Chamber was yet to rule on the Prosecutor’s application for a referral of Kenya to the ASP due to alleged non-cooperation (see below in the post-script on later developments).

More generally, the Kenyan Government has sought to portray the ICC and its supporters as tools of imperial powers who aim at undermining the sovereignty of the country by subjecting its leaders to a politicised accountability process. This, combined with a narrative which suggests that the ICC has unfairly targeted certain ethnic communities, has proved an effective strategy for altering many Kenyans’ perceptions of the ICC process from one of accountability to one of politics. Moreover, the Government has intimidated civil society organisations seen to be pro-ICC, including using social media to depict civil society as ‘evil society’. This has resulted in the Court losing important partners in advancing the accountability process as many of the human rights organisations that were active supporters of the ICC stopped working directly with the Court, including on victims’ issues, and became reluctant to continue advocating for the accountability process out of fear for the security of their staff (Hansen & Sriram, 2015).

The high level of hostility towards the ICC among Kenyan authorities has reportedly contributed to many witnesses no longer being willing to testify in the two cases. As Human Rights Watch (2014) notes, ‘[p]ervasive witness interference and intimidation has dogged inquiries into the [PEV] in Kenya, and the ICC prosecution has contended that an anti-ICC climate in Kenya has been a factor undermining its

¹⁵ Allegations of non-cooperation have been made in interviews with media and numerous Prosecution filings before the Trial Chamber. See e.g. ICC-01/09-02/11-944.

¹⁶ For example, Kenya’s Cabinet Secretary for Foreign Affairs Amina Mohamed called a Human Rights Watch report which alleged non-cooperation ‘outrageous and incomprehensible’, and further stated that claims that ‘the country was not co-operating with the ICC is not true at all’ (Bosire, 2014).

¹⁷ ICC-01/09-02/11-908.

investigations against Kenyatta'. Chief Prosecutor Bensouda has stated that her Office is 'having tremendous difficulties [...] with our witnesses not wanting to come forward or changing their minds at the last minute' (Nation, 2014). As a response to the continued withdrawal of witnesses, in December 2013 the Prosecutor requested the Trial Chamber to require the attendance and testimony of a number of unwilling witnesses in the Ruto and Sang case,¹⁸ a request which the Chamber granted.¹⁹ At the time of writing this Report, some of the witnesses who had been summoned had given testimony over a video link from Kenya. However, the summoned witnesses have tended to change their testimony, stating that their earlier accounts to the Prosecution are untruthful (Maliti, 2014).

The political and security climate in Kenya has also negatively affected the participation of victims in the cases. By way of example, in July 2013, the LRV in Case 1 noted that 'continuing security concerns relating to travel outside Nairobi' had restricted his meetings with new clients, and further observed that 'the victims are cautious about being identified as participating in the Court's proceedings due to a misunderstanding of the role of victims compared to that of witnesses in the proceedings'.²⁰ In June 2013, Kenyan media reported that 93 victims in Case 1 had 'written a letter to The Victims and Witness office based at The Hague wishing to withdraw from the ICC proceedings on the grounds that they did not have confidence that the process would be beneficial to them', further alleging that the Office of the Prosecutor is 'not interested in their welfare' (Standard Digital, 2014). The security of participating victims in the Kenyan ICC cases, and the measures taken by the ICC in this regard, are discussed in further detail below in Section 4.8.7.

¹⁸ ICC-01/09-01/11-1120-Red2-Corr.

¹⁹ ICC-01/09-01/11-1274, para 193.

²⁰ ICC-01/09-01/11-825, paras 1; 3.



3. The Relevant Legal Framework

3.1 The Rome Statute and the Rules of Procedure and Evidence

The legal framework for victim participation has left much to the discretion of ICC judges. Article 68(3) of the Rome Statute simply provides that ‘where the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused.’

Rule 85 of the Rules of Procedure and Evidence (RPE) defines victims as follows:

- (a) ‘Victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
- (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

The Court’s jurisprudence has elaborated on who may qualify as a victim under these rules and can thus be allowed to participate. In January 2006, Pre-Trial Chamber I, in relation to victims’ applications to participate in proceedings in the situation in the Democratic Republic of Congo,²¹ developed a four-part test, which was adopted in subsequent decisions of other Chambers,²² according to which: 1) the victim applicant is a natural person or an organization or institution; 2) a crime within the jurisdiction of the Court appears to have been committed; 3) the victim applicant has suffered harm, and 4) such harm arose ‘as a result’ of the alleged crime within the jurisdiction of the Court. In the Kenyan cases, following the Prosecutor bringing the charges against the accused, the test was reformulated as follows: 1) the identity of the victim appears to have been duly established; 2) the events described in the application for participation constitute the crime(s) within the jurisdiction of the Court with which the suspects are charged; and 3) the applicant has suffered harm that appears to have arisen ‘as a result’ of the crime(s) charged.²³ Accordingly, as noted by the Appeals Chamber in the Lubanga case, ‘whilst the ordinary meaning of Rule 85, does not per se limit the notion of victims to the victims of the crimes charged, the effect of Article 68(3) of the Statute is that the participation of victims in the trial proceedings, [...] is limited to those victims who are linked to the charges’.²⁴

Rule 86 of the RPE provides that the Chambers ‘in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence’.

Rule 89 of the RPE details the application process for victim participation as follows:

²¹ ICC-01/04-101-tEN-Corr, para. 79.

²² See e.g. Pre-Trial Chamber II’s decision in ICC 02/04-01/05-356.

²³ ICC-01/09-02/11-267, para. 40.

²⁴ ICC-01/04-01/06-1432, para. 58.

1. In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber. Subject to the provisions of sub-rule 2, the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.

2. The Chamber, on its own initiative or on the application of the Prosecutor or the defence, may reject the application if it considers that the person is not a victim or that the criteria set forth in article 68, paragraph 3, are not otherwise fulfilled. A victim whose application has been rejected may file a new application later in the proceedings.

Rule 90 of the RPE outlines the framework for legal representation:

1. A victim shall be free to choose a legal representative.
2. Where there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives.

Rule 91 further provides:

1. A Chamber may modify a previous ruling under rule 89.
2. A legal representative of a victim shall be entitled to attend and participate in the proceedings in accordance with the terms of the ruling of the Chamber and any modification thereof given under rules 89 and 90. This shall include participation in hearings unless, in the circumstances of the case, the Chamber concerned is of the view that the representative's intervention should be confined to written observations or submissions. The Prosecutor and the defence shall be allowed to reply to any oral or written observation by the legal representative for victims.

3.2 Initial decisions

The first decisions relating to victim participation in the two Kenyan cases were issued on 30 March 2011.²⁵ The Pre-Trial Chamber instructed the Victims Participation and Reparations Section (VPRS) to take certain measures relating to victims' applications and future participation in order to ensure the expeditious and efficient preparation and conduct of the proceedings, including starting to organise common legal representation for the confirmation of charges hearings. On 26 August 2011, Judge Ekaterina Trendafilova, acting as the Single Judge of Pre-Trial Chamber II in the Muthaura and Kenyatta case, granted the applications of 233 victims to participate in the confirmation of charges proceedings and, in line with the Registry's proposal, appointed Morris Azuma Anyah as the LRV for all the participating victims in the case.²⁶ In the Ruto and Sang case, on 5 August 2011, as Single Judge of Pre-Trial Chamber II, Judge Trendafilova,

²⁵ ICC-01/09-01/11-17; ICC-01/09-02/11-23.

²⁶ ICC-01/09-02/11-267.



granted the applications of 327 victims to participate in the confirmation of charges proceedings and appointed Sureta Chana as LRV.²⁷

3.3 The Trial Chambers decisions of 3 October 2012

On 3 October 2012, Trial Chamber V issued its decisions on victim participation and representation for the trial in the two Kenyan cases (3 October decisions). The Chamber emphasised that participation must be ‘meaningful’ and not ‘purely symbolic’.²⁸ The Chamber also noted that participation is not static, in that it is ‘not a once-and-for-all event, but rather should be decided on the basis of the evidence or issue under consideration at any particular point in time’.²⁹

Taking into account the jurisprudence of the Appeals Chamber, the Trial Chamber stated that in the present cases, in order to qualify as a victim under Rule 85 of the RPE, an individual, organisation or institution must ‘have suffered harm as a result of an incident falling within the scope of the confirmed charges’.³⁰ Significantly, the 3 October decisions apply only to victims’ participation in the trial proceedings – not to participation in potential future reparations proceedings.³¹

Compared to earlier decisions on victim participation, the decisions in the Kenyan cases set themselves apart in a number of important ways. Notably, victims who do not wish to appear in Court in person do not need to submit a detailed application as otherwise required under Rule 89 of the RPE. The decision to not require a detailed application from victims that participate through the LRV was based on the large number of victims involved as well as ‘unprecedented security concerns and other difficulties’ in the Kenyan cases.³² Accordingly, the decisions distinguish between direct individual participation and indirect participation through a common legal representative. The Chamber stated that the registration process for victims who are represented through the LRV should be ‘considerably less detailed and onerous than the application forms required by Rule 89(1) of the Rules and Regulation 86 of the Regulations’, and not be subject to individual assessment by the Chamber.³³ The Chamber decided that victims represented through the LRV may, if they so wish, register with the Registry, indicating their names, contact details as well as information concerning the harm suffered. The Chamber stated that the purposes of such registration include: 1) providing victims with a channel through which they can formalise their claim of victimhood; 2) establishing a personal connection between the victim and the LRV, enabling victims to provide their input and allowing the LRV to give relevant feedback to the victims; and 3) assisting the Court in communicating with the victims and in preparing periodic reports.³⁴ Concerning victims who had been authorised to participate at the confirmation of charges stage, the Chamber decided that, based on the Registry’s evaluation, they ‘shall

²⁷ ICC-01/09-01/11-249.

²⁸ ICC-01/09-01/11-460, para 10; ICC-01/09-02/11-498, para 9.

²⁹ ICC-01/09-01/11-460, para 13; ICC-01/09-02/11-498, para 12, referencing Trial Chamber I’s decision ICC-01/04-01/06-1110, para 101.

³⁰ ICC-01/09-01/11-460, paras 46-47; ICC-01/09-02/11-498, paras 45-46.

³¹ ICC-01/09-01/11-460, para 2; ICC-01/09-02/11-498, para 2.

³² The Chamber also emphasised the need to strike a ‘balance between the need to allow for the presentation and consideration of victims’ views and concerns, on the one hand, and to safeguard the rights of the accused and a fair and impartial trial, on the other’. ICC-01/09-01/11-460, paras 24, 29; ICC-01/09-02/11-498, paras 23, 28. Other studies have commented on the challenges associated with the models of victim participation used in other cases, noting that individual applications for participation to the Court have ‘put strain not only on the Registry, but also on the applicants, the parties as well as the judges required to consider the applications’ (REDRESS, 2012: 10).

³³ ICC-01/09-01/11-460, para 25; ICC-01/09-02/11-498, para 24.

³⁴ ICC-01/09-01/11-460, paras 49-50; ICC-01/09-02/11-498, paras 48-49.

be considered as having registered for the purpose of participation through the common legal representation system provided that they still fall under the definition set out above'.³⁵

However, even with the establishment of this simplified system for registering victims, the Chamber acknowledged that there could still be instances where registration is not possible for the victims concerned, for example due to victims' age or mental or physical capacities or 'social pressure not to report the crimes they claim to have suffered'.³⁶ For these reasons, the Chamber decided that the LRV must represent, 'in a general way', the views and concerns of victims who do not register.³⁷ Accordingly, during the trial phase the LRVs must make sure that the views and concerns of all the individuals qualifying as victims in cases are represented, whether or not they have been registered by the LRV.³⁸ In other words, the Trial Chamber assigned the LRVs with the task of representing the views and concerns of all individuals qualifying as victims in the cases, including: 1) those who would follow the application procedure set out in Rule 89; 2) those who would simply 'register' with the Court; and 3) those who either chose not to or were unable to register but whom the LRV has reasons to believe qualify as victims in the cases. However, while the Chamber in reality delegated its functions, it did not elaborate on how exactly the LRVs should determine who qualifies as victims.

The Chamber further clarified that victims wishing to present their views individually by appearing directly before the Chamber, in person or via video-link, may be allowed to do so at various stages of the trial, in a manner to be determined by the Chamber. In these situations, the LRV must submit a request on behalf of the victim, explaining why they are 'considered to be best placed to reflect the interests of the victims, together with a detailed summary of the aspects that will be addressed by each victim if authorised to present his or her views and concerns'.³⁹

The Chamber directed the VPRS to periodically provide detailed statistics about the victims' population in the cases, which are to be appended to 'a comprehensive report on the general situation of the victims as a whole, including registered and non-registered victims'.⁴⁰

The decision further clarified that the LRV will be based in Kenya and only be present in the courtroom during important moments of the proceedings.⁴¹ The Chamber stated that one such important moment of the trial involves the opening and closing statements, but made no further observations in this regard, other than noting that the LRVs' presence in the courtroom on other occasions requires the Chamber's approval.⁴² In all other instances, the Office of the Public Counsel for Victims (OPCV) is in charge of handling the legal proceedings in the courtroom, based on the LRV's instructions.⁴³ In this regard, the Chamber clarified that

³⁵ ICC-01/09-01/11-460, para 62; ICC-01/09-02/11-498, para 61.

³⁶ ICC-01/09-01/11-460, para 51; ICC-01/09-02/11-498, para 50.

³⁷ ICC-01/09-01/11-460, para 52; ICC-01/09-02/11-498, para 51. This aspect of the decision has been criticised by some commentators. Kendall and Nouwen (2013: 251), for example, note: 'Without a legal avenue for resisting representation as part of an abstract collectivity, even victims who do not want to have anything to do with the ICC can thus be "symbolically" "made present" in a case before the court.'

³⁸ ICC-01/09-01/11-460, para 53; ICC-01/09-02/11-498, para 52.

³⁹ In addition, these victims will be required to submit to the Registry a written application under Rule 89(1) of the Rules and Regulation 86 of the Regulations. ICC-01/09-01/11-460, paras 56-57; ICC-01/09-02/11-498, paras 55-56.

⁴⁰ The Chamber stated that these reports shall be prepared in cooperation with the LRV who shall provide the VPRS with detailed information relating to his or her activities amongst the victims. ICC-01/09-01/11-460, para 55; ICC-01/09-02/11-498, para 54.

⁴¹ In this regard, the Chamber emphasised that 'greater geographic proximity between victims and the Common Legal Representative is important to ensure that victims can communicate easily and personally with their representative and thus ensure meaningful representation'. ICC-01/09-01/11-460, para 60; ICC-01/09-02/11-498, para 59.

⁴² ICC-01/09-01/11-460, para 71; ICC-01/09-02/11-498, para 70.

⁴³ ICC-01/09-01/11-460, para 60; ICC-01/09-02/11-498, para 59.



the LRV will have 'primary responsibility for being the point of contact for the victims whom he/she represents, to formulate their views and concerns and to appear on their behalf at critical junctures of the trial'.⁴⁴ Accordingly, the OPCV's primary responsibility involves acting as the 'interface' between the LRV and the Chamber in 'day-to-day proceedings'.⁴⁵ This means that the OPCV is allowed to attend hearings on behalf of the LRV during which it may be permitted to intervene. The Chamber also decided that the OPCV shall assist the LRV in preparing relevant written submissions.⁴⁶

Concerning the actual modalities of victim participation, the Chamber provided a set of general guidelines. With regard to accessing the records, documents and filings of the cases, the Chamber noted that in accordance with Rule 131(2) of the RPE, victims or the legal representatives shall be granted the right to consult the public record of the proceedings.⁴⁷ Additionally, the Chamber decided that, in 'view of the specific circumstances of the present case' and in order to ensure that the participation by victims is meaningful, the LRV may have 'access to confidential filings, to the extent that their content is relevant to the personal interests of the victims he or she represents'.⁴⁸ In relation to evidence, the Chamber decided that the LRV will have access to the public and confidential documents in 'Ringtail'.⁴⁹ With respect to oral submissions, the Chamber decided to follow the practice of Trial Chambers I, II and III, according to which the LRVs are authorised to make opening and closing statements at the trial.⁵⁰ With regard to the LRVs' questioning of witnesses and the accused, the Chamber decided that this should in principle be allowed, but that the Chamber's authorisation is required and that such questioning will be conducted by the OPCV acting on behalf of the LRV, except where the Chamber authorises the LRV to appear in person.⁵¹ Concerning presentation of evidence, the Chamber decided that the LRV may submit an application for the presentation of evidence, which the parties may then provide their observations on, after which the Chamber will make a ruling based on whether the proposed evidence is 'relevant to the personal interests of victims, may contribute to the determination of the truth and whether it would be consistent with the rights of the accused and a fair and impartial trial'.⁵²

In order to facilitate this new mode of victim participation, the Chamber decided that the VPRS and the Common Legal Representative 'shall make sure that the victims in the present case are informed of the new procedure'.⁵³

While as noted above Rule 86 of the RPE requires the Chambers to take into account the needs of all victims and witnesses in making any direction or order, some respondents of this Report criticised Trial Chamber V for having failed to consult victims before making the above-mentioned decision. As one NGO expert observes: 'Victims should have had a bigger say in the appointment of LRVs; victims lack a voice in that process'.⁵⁴ Scholars such as Pena and Carayon (2013: 532-33) similarly note that the Chamber 'undertook

⁴⁴ ICC-01/09-01/11-460, para 42; ICC-01/09-02/11-498, para 41.

⁴⁵ ICC-01/09-01/11-460, para 43; ICC-01/09-02/11-498, para 42.

⁴⁶ ICC-01/09-01/11-460, para 43; ICC-01/09-02/11-498, para 42.

⁴⁷ ICC-01/09-01/11-460, para 64; ICC-01/09-02/11-498, para 63.

⁴⁸ The Chamber decided that it will be the responsibility of the filing party to indicate on the notification page whether the LRV shall be notified. Further, the Chamber decided that communication of confidential material to specific individual victims shall be subject to prior approval. ICC-01/09-01/11-460, paras 67-68; ICC-01/09-02/11-498, paras 66-67.

⁴⁹ ICC-01/09-01/11-460, para 69; ICC-01/09-02/11-498, para 68.

⁵⁰ ICC-01/09-01/11-460, para 73; ICC-01/09-02/11-498, para 72.

⁵¹ In order to guarantee the accused's right to a fair and expeditious trial, the Chamber further decided that questions put by the OPCV, on behalf of the LRV, shall be limited to 'issues relevant to the victims' interests'. ICC-01/09-01/11-460, para 75; ICC-01/09-02/11-498, para 74.

⁵² ICC-01/09-01/11-460, para 77; ICC-01/09-02/11-498, para 76.

⁵³ ICC-01/09-01/11-460, para 54; ICC-01/09-02/11-498, para 53.

⁵⁴ Author's interview with NGO representative (legal counsel, FIDA), Nairobi, June 2014.

no consultation with victims in 2012 in advance of making decisions in the Kenya cases that substantially modified the system for victim participation and representation', emphasising that while the relevant decisions 'contain numerous references to victims' interests, including security concerns', these considerations 'are based on the judges' own interpretation of these interests'.⁵⁵

3.4 Brief overview of subsequent events

Following Trial Chamber V's 3 October decisions, the persons who had acted as the LRVs in the pre-trial phase (Anyah and Chana) were asked whether they wished to continue representing victims under the new LRV system established by the Chamber.⁵⁶ Whereas Anyah stated that he was not interested in being nominated,⁵⁷ Chana indicated that she remained interested and available to represent the victims in that case, but also stated that she was unable to relocate to Kenya during the trial hearings.⁵⁸ However, in November 2012, following the Registry's recommendations, the Trial Chamber appointed Wilfred Nderitu and Fergal Gaynor as LRVs in Case 1 and 2, respectively.

Since the Trial Chamber issued its 3 October decisions, the LRVs and the VPRS have filed periodic reports on the general situation of victims in the cases and their activities in the field. The LRVs have also filed several requests to participate in specific hearings, some of which have been granted while others rejected. The LRV in Case 1 also requested meeting with witnesses prior to them giving their testimony at trial, a request which was granted by the Chamber, even if it noted that the LRV is not a calling party and that the Witness Preparation Protocol did not apply to such meetings.⁵⁹ As discussed in further detail below, the LRVs have filed numerous observations relating, for example, to the question of whether the trials should be conducted in The Hague, Arusha or Kenya. Some commentators have labelled these and other submissions of the LRVs 'useful' for the judicial process (Pena & Carayon, 2013: 526).

As of September 2014, the total number of victims verified by the LRVs as falling within the scope of Case 1 was 680,⁶⁰ whereas the LRV in Case 2 had determined that 725 victims fall within the scope of the case.⁶¹ Updated victim numbers following the drafting of this Report in November 2014 are provided in the post-script below.

⁵⁵ The absence of consultations with victims from the Court's side seems to pose a more general challenge to the participation regime. As Kenyans for Peace with Truth and Justice (KPTJ, 2013) argues: 'Too often decisions are taken by the various organs of the Court and the judges without consulting the victims, compounding their general sense of disempowerment. Justice is therefore rendered from above, without taking into consideration the needs and concerns from the ground'.

⁵⁶ ICC-01/09-01/11-467, para 14; ICC-01/09-02/11-517, para 14.

⁵⁷ ICC-01/09-02/11-517; ICC-01/09-02/11-517-Anx2-Conf-Exp.

⁵⁸ ICC-01/09-01/11-479, para 4.

⁵⁹ ICC-01/09-01/11-938.

⁶⁰ ICC-01/09-01/11-1537-AnxA

⁶¹ ICC-01/09-02/11-955-AnxA.



4. Victim Participation in the Kenyan ICC Cases

4.1 General situation of victims and their justice preferences

As such, the situation of PEV victims remains dire. Many of the respondents of this Report emphasised that both the coalition government in power from 2008-13 and the current government headed by Kenyatta have been neglecting victims.⁶² Importantly, as discussed in Section 2.2, many PEV victims are yet to be compensated and some are yet to be resettled.

While some interviewees noted that the lack of criminal accountability remains the most significant challenge for PEV victims,⁶³ many others observed that victims' perceptions of the importance of criminal justice have declined over time, especially since Kenyatta and Ruto gained power with the March 2013 elections.⁶⁴ While various factors relevant for understanding why victims' support for the ICC process has declined over time are discussed in the Sections below, it should be emphasised already at this point that hostility towards the process among Kenyan authorities presents a key reason. As one interviewee stated: 'Resistance to the ICC is growing among victims due to the political context where two of the accused [i.e. Kenyatta and Ruto] have gained power and succeeded portraying the ICC process as targeting whole ethnic communities'.⁶⁵ This resistance to the ICC among segments of the victim population has sometimes taken almost aggressive forms. For example, one NGO, which shows documentaries relating to the ICC process in local communities, had to 'shut down the screening of a documentary on the ICC', as community members got 'angry and upset' when Ruto's infamous statement 'don't be vague lets go to The Hague' was broadcasted.⁶⁶ Accordingly, while most PEV victims initially supported the ICC process, victims currently see criminal accountability as less vital, and some victims are outright opposed to the continuation of the ICC cases. However, even with the waning support for the ICC process among victims in general, there appears to be significant differences between participating and non-participating victims in terms of the level of support they show for the ICC, with those participating in the cases generally being more supportive of the accountability process.⁶⁷

Most respondents stressed that meeting basic needs – such as food, shelter, health care and education – remains the greatest challenge for PEV victims. As one respondent noted, 'livelihood is the greatest challenge for victims – the key problem'.⁶⁸ Another respondent elaborated: 'Many victims lost their jobs in urban centres, and now have no way of supporting themselves [...] they now live in small rented houses, and cannot afford education and medical support'.⁶⁹ Consequently, interviewees argued that victims are primarily looking for monetary compensation and other forms of support to improve their livelihood, not criminal accountability. In this regard, many interviewees emphasised that the government 'has not done

⁶² For example, author's interview with NGO representative (legal counsel, FIDA), Nairobi, June 2014.

⁶³ For example, author's interview with NGO representative (legal counsel, FIDA), Nairobi, June 2014.

⁶⁴ However, at the same time some of these respondents emphasised that there is still a call among some victims for prosecuting 'mid-level and low-level perpetrators', reportedly representing a change from earlier times where victims primarily 'called for prosecution of high-level perpetrators'. Author's interview with NGO representative (anonymous), Nairobi, June 2014.

⁶⁵ Author's interview with NGO representative (anonymous), Nairobi, June 2014. Similarly, another respondent noted that whereas most victims initially supported the ICC process and were eager to register as victims, 'things changed when the Jubilee Government came in', in particular because many Kikuyu and Kalenjin victims stopped supporting the pursuit of criminal justice in The Hague. Author's interview with NGO representative (legal counsel, FIDA), Nairobi, June 2014.

⁶⁶ Author's interview with NGO representative (anonymous), Nairobi, June 2014.

⁶⁷ Author's interview with NGO representative (anonymous), Nairobi, June 2014.

⁶⁸ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

⁶⁹ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

enough to compensate victims [and] many victims are yet to receive any compensation'.⁷⁰ Some respondents also stressed that many victims have not yet been 'identified and profiled', and for these reasons not received any assistance from the Government.⁷¹ In particular, it is a problem that IDPs not living in formal IDP camps are 'not recognised by Government as IDPs', meaning that they have not benefitted from the resettlement programmes discussed in Section 2.1.⁷²

These findings of the Project are consistent with the findings of several other research projects relating to victims in Kenya. Tenove (2013: 21), for example, observes that his interviewees in Kenya 'repeatedly insisted that victims of post-election violence need individualized compensation and livelihood assistance'. A research project carried out by the International Center for Transitional Justice (ICTJ, 2011: 21) similarly found that victims in Kenya are primarily looking for compensation and other forms of economic support, whereas judicial processes ranked much lower in terms of victims' preferences.⁷³ The Human Rights Center, UC Berkeley School of Law (2015: 58) observes that '[m]ore than half of Kenyan respondents said that reparations were their main reason for joining the ICC cases...[n]early all expected compensation when the trials concluded'.

Interviewees further stated that victims are seeking the Government's acknowledgment of their suffering, some emphasising that the 'lack of an apology by the Government is a real challenge for victims'.⁷⁴ Especially victims who suffered from Government abuses, such as Police shooting, reportedly seek this kind of redress.⁷⁵ In this regard, some respondents expressed concern that the Government never conducted a thorough screening to identify the 'real PEV victims', thus implying that some of those who have received assistance from the Government may not be victims of the PEV whereas many of those against whom abuses were committed, especially Government abuses, have not received assistance.⁷⁶ Besides acknowledgment from the Government, some respondents noted that victims are also looking for 'public discussion and debate in the public domain about [their] suffering', something which has been made more difficult due to the Government's policies towards the ICC.⁷⁷

However, whereas the importance of compensation and acknowledgement cannot be overstated, one cannot speak of victims' needs in generic ways as they have different priorities, depending for example on the kind of abuses they have suffered. For example, victims of SGBV generally prioritise getting access to counselling and medical care, though these challenges appear to have somewhat declined over time 'due to NGOs' interventions'.⁷⁸ Some respondents also observed that the PEV created specific challenges for victims who had married persons from other ethnic groups: 'Most of those whom had inter-married were

⁷⁰ For example, author's interview with NGO representative (anonymous), Nairobi, June 2014.

⁷¹ Author's interview with NGO representative (anonymous), Nairobi, June 2014.

⁷² Author's interview with NGO representative (anonymous), Nairobi, June 2014.

⁷³ 56 % of the victims consulted by the ICTJ stated that 'compensation/economic support' was their primary concerns, whereas 34 % mentioned 'resettlement/housing'; 33 % 'access to land'; 20 % 'judicial process'; 19 % 'recognition/acknowledgement'; 15 % 'livelihood'; 8 % 'peace/security'; and 5 % 'medical support'.

⁷⁴ Author's interview with NGO representative (anonymous), Nairobi, June 2014.

⁷⁵ However, it is likely that the victims of Police shootings prioritise this form of redress because the Government has made it clear that they 'should not be counted as victims'. Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

⁷⁶ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014. Tenove (2013: 13-14) reach similar conclusions.

⁷⁷ Author's interview with NGO representative (anonymous), Nairobi, June 2014.

⁷⁸ Author's interview with NGO representative (legal counsel, FIDA), Nairobi, June 2014; Author's communications with expert on victims' issues in Kenya (anonymous), Nairobi, June 2014.



forced to divorce and going by the African culture of naming children, the children were also left divided amongst parents'.⁷⁹

Further, victims have different needs depending on where they live. Some victims live in homogenous communities, whereas others live in locations with mixed ethnic composition, often close to their perpetrators. For the latter group, peace, stability and reconciliation is often the primary concern since many 'fear more political violence'.⁸⁰ There are also specific challenges with regard to IDPs. As one CBO representative noted: 'There have been resettlement efforts in some places, but many PEV victims have not yet been resettled', thus implying that this is their major concern, as opposed to for example justice processes.⁸¹ Another CBO representative emphasised that many IDPs never went to formal IDP camps, and this particular group of victims has 'never received any help from the Government'.⁸² Further, some respondents implied that there are significant differences between IDPs depending on their ethnicity: 'Most IDP were relocated from the camps but there are some that still live in the transit camps – a majority come from the Kikuyu community which was evicted from Rift Valley [...] however most integrated IDPs, especially Kisiis, Luhyas and Luos, are yet to receive any form of help from the Government [...] those who were relocated are not happy with their new homes because the areas where they were relocated to are semi-arid and most lack social amenities'.⁸³ Several other interviewees similarly reported that the Government's efforts to resettle victims and provide compensation have been ethnically biased.⁸⁴

One respondent summarised the above well when stating that PEV victims are primarily looking for reparations, especially monetary compensation, whereas accountability is 'a secondary need' for most PEV victims. The respondent explained that this could be looked at in terms of a 'sequencing approach', where 'immediate needs relating to livelihood need to be first addressed before we can discuss criminal justice'.⁸⁵ On this basis, other research projects relating to victim participation in the Kenyan ICC cases question: '[H]ow will victims be able to participate in the proceedings before the ICC while their basic needs such as housing and medical assistance remain unmet? Is the participation of victims in the process meaningful if their dignity is not first restored and their social and economic rights upheld? Indeed, how will victims be able to participate in a meaningful manner if they continue to eke out a meagre existence almost five years after the violence ended?' (KPTJ, 2013: 5).

Respondents further elaborated on victims' preferences with regard to other measures of truth and justice implemented or considered in Kenya. The general view among interviewees is that victims view the ICC process as a 'second best measure' for accountability, as most would have preferred a local accountability process. As one CBO representative explained: 'The national courts failed to try mid-level perpetrators, but it would be really important for victims to see low and mid-level perpetrators charged – their neighbours who committed the crimes'.⁸⁶ More generally, another respondent observed: 'Genuine truth-telling,

⁷⁹ Author's communications with expert on victims' issues in Kenya (anonymous), Nairobi, June 2014.

⁸⁰ Author's interview with NGO representative (anonymous), Nairobi, June 2014.

⁸¹ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

⁸² The respondent further noted that 'most of the victims in the IDP camps have received compensation of 10.000 KES', which has allowed them to buy land, 'but non-IDP victims did not receive any compensation.' Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

⁸³ Author's communications with expert on victims' issues in Kenya (anonymous), Nairobi, June 2014.

⁸⁴ One CBO representative, for example, noted that 'particular ethnic groups, in particular Kikuyus, were prioritised by the Government', something which has reportedly 'created tensions among victims or even ethnic hatred'. Another CBO representative similarly emphasised that 'there has been corruption in [implementing] the compensation schemes'. Anonymous participants (CBO representatives) in workshop organised by Impunity Watch, Nairobi, June 2014.

⁸⁵ Author's interview with NGO representative (anonymous), Nairobi, June 2014.

⁸⁶ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

acknowledgement, and national dialogue is more important for victims than the ICC [but] this will not happen under the current regime'.⁸⁷ Some respondents specifically compared participation in the ICC cases with the TJRC process: 'Compare to the TJRC – here you had 50.000 victims giving statements, but the TJRC was so corrupted, so the ICC is important'.⁸⁸

Further, as discussed above in Section 2.2, some Kenyan-based NGOs have filed civil suits against the Kenyan Government for failing to fulfil its responsibilities in connection to the PEV. Though the outcome of these national cases is uncertain, some argue that the ICC process may have negatively impacted victims' ability or interest in joining these civil suits, and thus a domestic process that could potentially benefit them. According to one NGO expert, 'victims who are participating in [these] cases don't want to deal with the ICC cases – it is either or'.⁸⁹ Another respondent similarly noted, 'some of the victims we [i.e. specific NGO] initially worked with and registered for the IDP case later pulled out of the IDP case after being registered in the ICC [cases]'.⁹⁰

Accordingly, the prevailing view relating to accountability mechanisms is that victims would have preferred a domestic process, but due to the Kenyan Government's failure to establish a credible criminal justice process, the ICC remains the only feasible avenue for accountability.⁹¹ As one CBO representative observed, 'there is no political will for achieving anything in Kenya, so the ICC is important for victims'.⁹² These findings of the Project are compatible with the conclusions of scholars who have examined the ICC process in light of other TJ measures. Hansen & Sriram (2015), for example, conclude that due to the existing political climate in Kenya, the ICC is seen as the 'the only game in town'. Tenove (2013: 15) similarly concludes that support for the ICC process among victims must be viewed in light of the inability of the domestic judicial systems to fairly and effectively bring powerful individuals to account (though also noting that many victims are disappointed with the ICC's impartiality and effectiveness).

Importantly, none of the respondents for this Report mentioned traditional or alternative forms of justice mechanisms as relevant processes for addressing the needs of victims. The absence of such discussions corresponds well with the findings of other research projects relating to victims in Kenya. Tenove (2013: 19), for example, states: 'When asked about traditional or customary justice practices, none [i.e. victim respondents in Kenya] supported their use and just two of 44 suggested that forgiveness — combined with public admissions of responsibility — was preferable to trials'.

4.2 Victims' knowledge of the ICC including the victims' participation regime

As noted by REDRESS (2012: 24): 'Effective victim participation is contingent on victims receiving information about the Court, the proceedings and the outcomes thereof [...] [i]nformation provision is also crucial to make victim participation meaningful and to clarify what victims may expect from the Court process'.⁹³ Importantly, the ICC's Revised Strategy in relation to Victims emphasises 'a commitment to realise victims' right to information related to the Court, its activities and processes', and further notes that the Court 'is committed to meeting victims' need to understand this information: tailoring it to the different

⁸⁷ Author's interview with NGO representative (anonymous), Nairobi, June 2014.

⁸⁸ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

⁸⁹ Author's interview with NGO representative (anonymous), Nairobi, June 2014.

⁹⁰ Author's interview with NGO representative (legal counsel, FIDA), Nairobi, June 2014.

⁹¹ Author's interview with NGO representative (legal counsel, FIDA), Nairobi, June 2014.

⁹² Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

⁹³ Redress, Possible reforms to the victim application process, 2012, p 24.



cultures and circumstances of affected communities, as well as with an awareness of different attitudes toward the ICC, the alleged crimes and justice in affected communities.⁹⁴

However, the findings of this Project indicate that in Kenya, victims' knowledge of the ICC, including the framework for participation, is generally poor, a finding that corresponds with the conclusions of the Human Rights Center, UC Berkeley School of Law (2015) on the basis of extensive consultations with victims in Kenya and a number of other ICC situation countries. One NGO expert consulted for this Report went so far as to suggest that 'only 2 out of 10 victims are somewhat familiar with the victim participation regime'.⁹⁵ However, the same respondent also observed that while victims' knowledge of the participation regime was 'very poor' when the cases were opened it has since improved.⁹⁶ Similarly, another interviewee observed that victims' knowledge of the ICC is 'better now than in the past', for a large part due to the work carried out by NGOs operating in Kenya.⁹⁷

Yet, a distinction must be drawn between the knowledge of participating and not participating victims, with the former group having a significantly better understanding of the ICC, including the framework for participation.⁹⁸ Some respondents further observed that the level of knowledge is relatively better among participating victims in Case 2 due to the LRVs 'extensive engagement' with victims.⁹⁹ Moreover, there appears to be significant differences in terms of victims' knowledge, depending on where they live. As one interviewee noted: 'You have "pockets" where victims have extensive knowledge [...] in Eldoret, the victims have quite extensive knowledge because it became the "workshop centre" for the ICC and NGOs, but in other, more rural areas, victims may have no knowledge at all'.¹⁰⁰

Respondents pointed to a number of challenges arising out of victims' limited knowledge of the ICC. For example, one NGO expert noted that 'many victims started thinking that they would be witnesses in the trials', thus indicating fundamental misconceptions about the ICC's victim participation regime.¹⁰¹ Furthermore, some respondents indicated that many victims are not able to distinguish between different organs of the ICC: 'They think everything is the OTP [and] the LRVs are seen as second Prosecutors'.¹⁰² Further with regard to the role of the LRVs, some respondents observed that most victims do not understand the mandate of the LRVs and often make demands from them, which is beyond their mandate, including asking for 'monetary help and other services'.¹⁰³ There may also be risks associated with victims' limited understanding of what it means to participate as a victim. As one respondent notes, many registered as victims in the cases 'without considering whether it could [entail] risks to their personal security'.¹⁰⁴

Several interviewees observed that the limited knowledge of the ICC and the participation regime must be

⁹⁴ ICC, Assembly of States Parties, 'Court's Revised Strategy in relation to Victims', ICC-ASP/11/38, 5 November 2012, para 15(b).

⁹⁵ Author's interview with NGO representative (legal counsel, FIDA), Nairobi, June 2014.

⁹⁶ Author's interview with NGO representative (legal counsel, FIDA), Nairobi, June 2014.

⁹⁷ Author's interview with NGO representative (anonymous), Nairobi, June 2014.

⁹⁸ Author's interview with NGO representative (anonymous), Nairobi, June 2014.

⁹⁹ Author's interview with NGO representative (anonymous), Nairobi, June 2014.

¹⁰⁰ Author's interview with NGO representative (anonymous), Nairobi, June 2014.

¹⁰¹ Author's interview with NGO representative (anonymous), Nairobi, June 2014.

¹⁰² Author's interview with NGO representative (anonymous), Nairobi, June 2014. Asked how much victims understand concerning the role of different Court organs, a CBO representative noted that 'most don't know anyone else than the OTP and the LRV'. Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹⁰³ Author's communications with expert on victims' issues in Kenya (anonymous), Nairobi, June 2014.

¹⁰⁴ However, the same respondent noted that 'there are also some victims with good knowledge [who] are aware of the risk associated with participating in the ICC cases but willingly take it'. Author's interview with NGO representative (anonymous), Nairobi, June 2014.

viewed in light of the Government's success with 'manipulating' the justice process.¹⁰⁵ According to one CBO representative, many victims actually believe that 'the cases are already terminated because the accused have "soldiers" on the ground that spread misinformation'.¹⁰⁶ In particular, victims who support Kenyatta reportedly believe that 'the case is over, due to manipulation'.¹⁰⁷ Furthermore, victims' limited knowledge appears to have to do with their limited opportunities following the proceedings in the media. As one CBO representative noted: 'It has been difficult for victims to follow the proceedings because of *in camera* hearings [...] there are too many private sessions; it is impossible to follow'.¹⁰⁸ However, this seems to be only part of the problem since many victims have lost interest in following the hearings and proceedings. For example, according to a CBO representative, 'people and victims in Kericho are no longer curious [about the ICC cases] [...] too much time has passed'.¹⁰⁹ Another CBO representative similarly observed that 'even if broadcasted on national television, no one follows anymore – the priorities are different now; people would rather restart their lives than follow the proceedings'.¹¹⁰ In particular, women appear to be 'less interested' in following the proceedings because they have to 'concentrate on livelihood'.¹¹¹ However, as discussed in further detail in the Section below, the limited scope and quality of ICC outreach also presents a serious obstacle for victims to obtain sufficient knowledge of the Court and the framework for victims' participation.

4.3 Outreach activities and victims' participation therein

Outreach work is self-evidently important for creating an efficient participation regime. As noted by an expert panel organised by Amnesty International and REDRESS (2013: para 8), victims 'will only participate if they are informed of and understand their rights to participate and seek reparation before the ICC'. The ICC's Revised Strategy in relation to Victims also recognises that victims must 'receive clear communications about the ICC, its mandate and activities as well as their right as victims in relation to the elements of the ICC system and at all steps of the judicial process'.¹¹²

The general understanding among the respondents of this Report is that ICC outreach activities have not been conducted satisfactorily, especially at the early stages of the proceedings, and that this has had a negative impact on victim participation in the Kenyan cases. As one CBO representative noted, 'outreach has been very low; very insufficient'.¹¹³ Another CBO representative observed: 'Victims are confused about

¹⁰⁵ For example, Author's interview with NGO representative (anonymous), Nairobi, June 2014.

¹⁰⁶ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014. Another participant emphasised that 'the Government's misinformation is very strong [...] on the ground, victims believe the propaganda'. Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹⁰⁷ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹⁰⁸ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹⁰⁹ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹¹⁰ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014. Similarly, another respondent noted that 'initially, when the cases started, they [i.e. the victims] were following almost every proceeding but with time the momentum has slowly died'. Author's communications with expert on victims' issues in Kenya (anonymous), Nairobi, June 2014.

¹¹¹ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014. One expert further noted: 'Participating women keep reducing in numbers as they argue at the end of the day they will need to go home with something for the children [...] after losing their source of income during PEV, their meals depend on the casual work for the day and ICC meeting don't cater for that just exact transport reimbursement'. Author's communications with expert on victims' issues in Kenya (anonymous), Nairobi, June 2014.

¹¹² ICC, Assembly of States Parties, 'Court's Revised Strategy in relation to Victims', ICC-ASP/11/38, 5 November 2012, para 18.

¹¹³ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.



the status of the cases [...] there is so much confusion about the legal rules and the rulings [...] because there has been such a poor communication of the rulings; victims don't get to hear it'.¹¹⁴

Due to the limited and sometimes flawed outreach activities – both by the ICC unit formally in charge of outreach (the Public Information and Documentation Section (PIDS)) and other organs of the Court, including the Prosecution, involved in various types of outreach¹¹⁵ – victims' expectations to the ICC process reportedly became unrealistic from the outset. As one NGO expert noted, 'victims' expectations of what the ICC can achieve [are] too high because of poor outreach'. The same respondent noted that the 'previous Prosecutor [i.e. Moreno-Ocampo] raised too high expectations about what the ICC can achieve, including for victims'.¹¹⁶ In this regard, the LRV in Case 2 observed that some victims have expressed the view that 'during Moreno-Ocampo's time, things were going well, and during Bensouda it has all been falling apart'.¹¹⁷ Research conducted by Hansen and Sriram (2015) similarly concludes that the conduct of the former ICC Prosecutor raised unrealistic expectations as to what the ICC could achieve in Kenya.

However, statements made by the former Prosecutor, which have inflicted high expectations among Kenyans, including the PEV victims, is not the only challenge in terms of the information provided by the ICC with respect to the Kenyan ICC cases. For example, as one NGO expert notes, the ICC appears only 'to a very limited extent' to have planned outreach activities explaining the difference between being a witness and a victim.¹¹⁸ Emphasising that, if from the outset, the ICC had conducted more outreach meetings in victim communities, the same respondent argues that 'down the line' this would have contributed to more realistic expectations among victims.¹¹⁹ One problem in this respect seems to relate to lack of coordination among different ICC bodies involved with outreach. REDRESS (2012: 25) notes: 'While it is clear that coordination exists in practice and that VPRS is actively involved in PIDS activities, it seems that at the strategic level, the question of how and when PIDS activities can and should contribute to effective and meaningful victim participation is not yet sufficiently developed'. As noted by REDRESS (2012: 24), limited funding for ICC outreach appears to present a significant challenge in this regard.¹²⁰

Additionally, ICC organs' heavy reliance on intermediaries in outreach activities raises some concerns. One CBO representative observes that this system has not been working because 'victims couldn't get [information] because the VPRS relied on intermediaries with limited resources'.¹²¹ Further, the risks faced by intermediaries in Kenya also seem to have complicated their efforts to 'reach out', as one respondent put it.¹²² The role of intermediaries in the ICC's work is regulated by guidelines which provide that the Court may interact with intermediaries, for example, for the purposes of assisting victims with the submission of an application, requests for supplementary information and informing them about decisions concerning

¹¹⁴ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹¹⁵ As also noted by REDRESS (2012: 25), in practice, various organs of the Court, including PIDS, the Office of the Prosecutor and the VPRS, are involved in conducting different types of outreach activities.

¹¹⁶ Author's interview with NGO representative (anonymous), Nairobi, June 2014.

¹¹⁷ Author's interview with the LRV in Case 2, Nairobi, June 2014.

¹¹⁸ Author's interview with NGO representative (Elizabeth Evenson of Human Rights Watch), Nairobi, June 2014.

¹¹⁹ The respondent further noted that the 'concern is that in Kenya, outreach came too late; after the political environment changed, after which outreach became difficult'. Author's interview with NGO representative (Elizabeth Evenson of Human Rights Watch), Nairobi, June 2014.

¹²⁰ In this regard, REDRESS (2012: 24) notes that the 'PIDS budget, which includes numerous other functions as well as outreach, has never reached above 3.5% of the Court's overall budget'.

¹²¹ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹²² Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014. Similarly, another CBO representative noted that 'outreach is so difficult because of the security concerns, both for ICC staff, intermediaries, victims, and for us [i.e. the CBOs]'. Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

their participation.¹²³ However, as pointed to by REDRESS (2012: 27), a limitation of these guidelines is that they only apply to intermediaries that are selected by the Court, whereas ‘in practice there is limited control over the selection of intermediaries’, as they are frequently ‘selected by the victims or the circumstances in which the victims find themselves’.¹²⁴

It seems clear that the limited ICC outreach has had negative consequences for victims’ participation in the Kenyan cases. For example, according to a CBO representative, limited ICC outreach at the early stages of the process meant that victims were not getting information relating to the deadlines for applying for registration.¹²⁵ The challenges associated with conducting efficient outreach also means that some victims missed important meetings. As one CBO representative observes: ‘ICC staff often fail to be consistent when they call for meetings; venues are changed but with no information’, resulting that victims often fail to obtain crucial information about participation.¹²⁶ Furthermore, limited ICC outreach has meant that many victims, in particular situation victims, have not been informed about their status in the participation process. One respondent elaborates: ‘There exists an information gap for victims of the situation [...] many registered to participate and in the forms they were filling a lot of confidential information, however most are yet to hear from the Court whether they are participating or fell out of scope [...] victims of the situation are often side-lined, yet they willingly registered to participate in the process [...] most of them [i.e. situation victims] just wanted information about their status and continued role in the cases [...] the process has proved to be slow and the once high expectations have been dealt a blow’.¹²⁷

Due to the limited outreach carried out by the ICC, NGOs have to a large extent taken over the task of informing and engaging victims on the ICC process. Noting that ICC outreach activities have followed a ‘parachute approach’, one respondent stressed that ‘much of the outreach has been conducted by NGOs’, which therefore became ‘seen as part of the ICC among victims’.¹²⁸ At the same time, NGOs also pushed the ICC to conduct better and more outreach, for example by advocating that the Court should ‘make a small brief on the major rulings’.¹²⁹

Furthermore, the LRVs have contributed significantly to outreach to victims.¹³⁰ Beyond informing victims of issues relating to the ICC process during meetings with them, the LRVs’ interviews with media houses have seemingly proven important for disseminating knowledge about the ICC as well as the situation of victims. One LRV elaborated on the importance of making such public statements relating to the ICC process. While observing that there is an ‘ethical issue as to the matters that can be addressed when lawyers speak to the media in a jury trial’, he felt that ‘these ethical issues are somewhat different with respect to the ICC cases, where there is no jury, and the ICC has issued specific decisions on the question of speaking to the media’. He further noted that the Prosecutor is ‘completely absent in Kenya’ in terms of outreach. This absence, he noted, disappoints victims because they ‘are also looking to the Prosecutor for leadership’. Whereas the LRV observed that the ICC outreach section should be ‘neutral because it is under the Registry’, he strongly

¹²³ ICC, ‘Guidelines Governing the Relations between the Court and Intermediaries’, March 2014, Annex (p 3).

¹²⁴ On this basis, REDRESS (2012: 27) argues that ‘unless sufficient resources are specifically set aside to manage relationships with intermediaries, particularly for systematised and regular training, much of the text will be meaningless’.

¹²⁵ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹²⁶ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹²⁷ Author’s communications with expert on victims’ issues in Kenya (anonymous), Nairobi, June 2014.

¹²⁸ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹²⁹ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹³⁰ In this regard, one CBO representative noted that ‘participating victims appreciate the LRV activities [because] this is where they get their information.’ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.



felt that the Prosecutor should engage more frequently with Kenyan media in order to counter anti-ICC messages, which have been promoted in the Kenyan media.¹³¹

In sum, it seems clear that the ICC has failed to live up to its responsibility to conduct sufficient outreach, and that this has had negative consequences for making victims' participation meaningful. As one interviewee concluded: 'The Court has been out of touch with reality; they want victim participation but there are insufficient resources'.¹³²

4.4 General perceptions of victim participation in the Kenyan ICC cases

As noted above in Section 3.3, there are significant differences between the participation regime adopted in the Kenyan cases and other cases before the Court. Overall, respondents have quite diverse views concerning the appropriateness of the victim participation regime created with the 3 October decisions. For example, while most interviewees are sympathetic of the requirement that the LRVs are based in Kenya, many feel that the LRVs should be permitted to be present in the courtroom. Additionally, many respondents noted that the benefits and challenges of the victim participation regime cannot be viewed alone in legal and technical terms, but must be examined in its broader political and social context in which it is utilised, something that gives rise to a variety of concerns in the Kenyan situation.

As a general benefit of victim participation in the ICC cases, respondents emphasised that 'participation is very important because it means victims were brought to focus for the first time in Kenya'.¹³³ In more specific terms, respondents observed that participating victims benefit from getting access to information about the ICC cases, notably due to the activities of the LRVs.¹³⁴ Many respondents also emphasised the psychological and social benefits of participating, in particular because participating victims can interact with other victims and discuss their past and current situation'.¹³⁵

However, there are numerous challenges for the participation regime. While specific issues arising out of the Chamber's decisions, such as the role of the LRVs vis-à-vis the OPCV, are discussed in detail below, some of the more general challenges for victims pointed to by respondents as factors that have hampered meaningful participation include the length of the ICC proceedings and the continued absence of reparation for many victims. For example, one respondent noted that due to the time span of the ICC cases, 'no one anymore thinks they will benefit from the ICC – from participating – no one is any longer proud to be a victim'.¹³⁶ Another interviewee observed that many victims initially chose to participate because they thought it would help them obtain reparations, but 'now that they know it is not linked, they don't see any benefit of participating'.¹³⁷

The timeline of the ICC process thus appears as a significant challenge from the perspective of victims because the length of the process exposes them to an extended period of uncertainty regarding outcomes (with consequent security implications, as discussed below) and because, even if compensation would be

¹³¹ Author's interview with a LRV in the Kenyan cases, Nairobi, June 2014.

¹³² Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹³³ Author's interview with NGO representative (anonymous), Nairobi, June 2014.

¹³⁴ For example, anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹³⁵ As one interviewee observed, 'the victims benefit because they get to interact with other victims; there is social interaction, which is useful'. Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹³⁶ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹³⁷ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

forthcoming, it would materialise after many years of extreme economic precariousness due to the combination of loss and endemic poverty. This finding corresponds with the conclusions of the Human Rights Center, UC Berkeley School of Law (2015: 4), noting that: ‘victim participants, like other observers of the ICC, complained about the inordinate length of the ICC judicial process. Many victim participants were concerned that they would die before verdicts or reparations decisions, and some worried that delays in proceedings could compromise their personal information and cause them security problems. Some said that such delays signaled corruption at the court, and that infrequent updates about court developments damaged goodwill in their communities.’

Many respondents further emphasised the importance of viewing the victim participation regime in the context of developments in the cases and, more broadly, the political environment in Kenya. As one interviewee noted, a key challenge for victim participation in the Kenyan cases relates to ‘lack of State cooperation [because] the Government creates obstacles for victims to participate, though they have an obligation to help facilitate’.¹³⁸ Another respondent similarly observed that there have been significant changes in victims’ support depending on the political environment because ‘politics affect victims’ understanding and support for the ICC’.¹³⁹ In this regard, the interviewee observed that ‘reconciliation at the political level – Kenyatta and Ruto coming together – changed victims’ support for the ICC and their willingness to participate in the case’.¹⁴⁰ Another interviewee noted that ‘the hype that was there when the cases started made victims believe they would easily take centre stage in the process, but later on with the changing political situation, there has been much less attention to victims, which has disappointed them’.¹⁴¹ These perceptions illustrate that the benefits and challenges of victim participation must be viewed in light of the broader political context in which such mechanisms are utilised. Notably, a hostile political environment can present serious obstacles to giving effect to any benefits of victim participation.

Related to the above, some respondents observe that the ‘ethnic dimensions of the cases mean that many victims don’t support the ICC cases because they believe their ethnic leaders are on trial’.¹⁴² Even if some victims are still looking for criminal convictions, many thus tend to view the entire process in ‘ethnic terms’.¹⁴³ Accordingly, political and ‘ethnic issues’ in Kenya seem to have partly undermined the goals of victim participation.

4.5 The application process

Respondents generally lauded the system created in the Kenyan cases where individual applications from victims to the Court are only necessary for victims who want to present their views and concerns individually before the Court. Other observers similarly find this aspect of the decisions positive. REDRESS (2012: 38), for example, argues: ‘In many ways, though untested, this is a far more attractive and potentially effective efficiency measure than the resort to a partially or fully collective application process and/or collective participation procedure before the relevant Chamber [...] In particular, the tiered application and participation process in principle, places emphasis on the substance of participation as opposed to the eligibility process, and avoids the scenario of complicated and protracted application processes for victims

¹³⁸ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹³⁹ Author’s interview with NGO representative (anonymous), Nairobi, June 2014.

¹⁴⁰ Author’s interview with NGO representative (anonymous), Nairobi, June 2014.

¹⁴¹ Author’s interview with the LRV in Case 1, Nairobi, June 2014.

¹⁴² Author’s interview with NGO representative (anonymous), Nairobi, June 2014.

¹⁴³ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014. Further with regard to the impact of ethnicity on victims’ participation, some victims in Case 1 reportedly ‘have a problem’ with the ethnicity of their LRV. Author’s interview with NGO representative (legal counsel, FIDA), Nairobi, June 2014.



who will ultimately, in most circumstances, be represented through a common legal representative who most often is raising very generalised views and concerns’.

However, the respondents of this Report often noted that the actual process of registering for participation in the Kenyan ICC cases has faced significant challenges. In particular, victims have lacked information on the process and been confused about how to register and the purposes thereof. According to one interviewee, these problems started early on: ‘In 2011, Kenyan lawyers thought that the more victims they got registered, the more likely were they to be appointed LRV [...] there was competition among the lawyers’.¹⁴⁴ Many of the victims who registered early on were reportedly later informed that they had not filed the correct forms or that the forms were not correctly filled, and victims faced challenges obtaining the correct forms, in part because ‘conmen’ falsified forms, informing victims that they had to pay to obtain one.¹⁴⁵

The VPRS seems to be at least partly to blame for these shortcomings. As one interviewee notes, ‘there was lack of coordination in VPRS and a lot of forms were lost; many forms were lost and never recovered’.¹⁴⁶ Another respondent elaborates: ‘VPRS came with different information at different times: first we filled in the form for being registered as victims; after some time we were told that the form we filled was only for situation victims and that case victims had to fill another form’.¹⁴⁷ Some respondents were concerned that there was ‘no transition from the early registration to the LRVs’, meaning that many of the victims who had registered in the initial process had to re-register or were simply not counted as registered victims.¹⁴⁸ These challenges created ‘apathy among victims’.¹⁴⁹

Furthermore, some respondents were concerned with the contents of the original forms: ‘There was a question of who was responsible for the crime [...] this was problematic because many didn’t know their perpetrator or didn’t dare to mention him [...] in the initial form, there was also a question of whether the information could be disclosed to the defence – this made many victims scared’.¹⁵⁰ There was also a level of confusion with respect to the purpose of registration: ‘Many victims thought they had registered for compensation – there was so much uncertainty and confusion – this is because there was a section in the victim participation form that said the victim should mention his or her losses’.¹⁵¹

Further, Kenyan NGOs, such as the International Center for Policy and Conflict (ICPC), were substantially involved in registering victims. According to the ICPC (undated), a key lesson from this process is that ‘victims were extremely apprehensive about meeting outsiders as they feared possible persecution by those who would perceive them as being somehow supportive of the court process [...] it became apparent that future registration efforts would need those conducting the registration to move closer to the victims’.

Even if it appears that the registration process has become more effective and transparent under the LRVs,¹⁵² there are also challenges to the current regime. Notably, having the LRVs register victims has

¹⁴⁴ Author’s interview with NGO representative (anonymous), Nairobi, June 2014.

¹⁴⁵ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹⁴⁶ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹⁴⁷ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹⁴⁸ Author’s interview with NGO representative (anonymous), Nairobi, June 2014.

¹⁴⁹ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹⁵⁰ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹⁵¹ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹⁵² One respondent, for example, noted that ‘it is more efficient now with the LRV registering victims because of the initial screening process done by the intermediaries’. Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

‘created an extra burden for LRVs, for which they don’t have sufficient resources’.¹⁵³ Additionally, some view it as ‘a big problem that the LRVs are only given forms for case victims, whereas the VPRS takes care of the situation victims’.¹⁵⁴ Finally, while the LRVs’ registration of victims is an on-going process, some respondents noted that the registration mainly takes place in ‘CORD areas [i.e. opposition strongholds], because of the security situation in Jubilee areas [i.e. Government strongholds] and because victims in Jubilee areas are [less] interested in participating’.¹⁵⁵

4.6 The distinction between case and situation victims

4.6.1 Critique of the distinction

In the literature on victims’ participation, concerns have been expressed concerning the Court’s distinction between victims who are allowed to participate in the ICC cases (‘case victims’) and victims who are not granted the possibility to participate because they do not fall within the scope of the charges (‘situation victims’). Kendall and Nouwen (2013: 252), for example, point out that while the ICC is portrayed as a victims’ oriented court, in reality only few victims get a chance to participate, and of those who are granted participant status, only ‘a handful’ are allowed to appear during trial proceedings. Noting that according to the Court’s jurisprudence, a link must be established between the harm suffered by the victim and the charges brought against the accused, Pena and Carayon (2013: 529) similarly note that this requirement ‘poses significant challenges, in practice leaving many victims out of the scope of the cases’. They exemplify with the Ruto and Sang case: ‘The Court considerably reduced the geographical and temporal scope of the Ruto and Sang case when closing the pre-trial proceedings because of limitations in the prosecution’s evidence [...] Victims expressed concerns and disappointment, as the decision resulted in the exclusion of many victims from the proceedings.’ Based on his interviews with victim groups in Kenya, Tenove (2013: 13) concludes that many situation victims are distressed by not being allowed to participate in the cases, in this regard noting that the situation victims ‘felt that the harm against them was being ignored or denied by the ICC, and their normative claims to justice thereby rejected [and] were disappointed that the ICC would not help them pursue accountability, truth-telling or reparations’. Research carried out by KPTJ (2013: 5) also concludes that it is unfortunate that ‘the majority of the victims of the post-election violence’ are considered situation victims and thus have ‘very limited’ participatory rights.¹⁵⁶

Similarly, the respondents of this Report were sceptical towards the distinction between case and situation victims. Though it would have proven difficult in practice to allow all victims of the PEV to participate in the cases, observations by one CBO representative reflect the general understanding: ‘all who suffered harm during the PEV should be defined as victims, including those who suffered physical violations and those who were displaced’; the rationale being that ‘all victims are equally deserving of help from the ICC – none more than others’.¹⁵⁷

The criticism relating to the distinction between case and situation victims was perhaps voiced most clearly by the two LRVs. As the LRV in Case 2 noted: ‘how can I go to the ground and explain to a women who was raped that she was raped two days “too late”? [...] what are we really achieving by excluding the raped lady?’. The LRV further explained that when he meets victims who he cannot register as victims in the case, ‘literally you have to explain to the victim that what happened was a crime to you, but you are not a case

¹⁵³ Author’s interview with NGO representative (Elizabeth Evenson of Human Rights Watch), Nairobi, June 2014.

¹⁵⁴ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹⁵⁵ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹⁵⁶ See further Taylor (2014: 17) for a discussion of how participation regimes may have potentially harmful effects upon ‘unrecognised’ victims.

¹⁵⁷ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.



victim'.¹⁵⁸ Similarly, the LRV in Case 1 emphasised the difficulties associated with explaining to victims why they fall outside the scope of the charges: 'This is a very real challenge that I have faced, especially because victims generally consider themselves victims of the situation, not the case [...] [it is] very difficult to make victims understand why they fall outside the case, because of the Prosecution's decisions' with respect to the scope of charges'.¹⁵⁹

Many NGO experts similarly noted that it is a serious problem that victims cannot understand why some are accepted in the cases but others not.¹⁶⁰ Some also observed that 'the case/ situation victim distinction is not helpful, because sometimes situation victims suffered more than case victims [...] it creates a feeling that victims are only there to decorate the Court'.¹⁶¹ Other respondents, however, observed that with time, more victims have come to understand the distinction, though many still question its legitimacy. As one expert noted: 'Even though by time most have come to understand who is a victim of the case and a victim of the situation most still don't understand how the court narrowed down the geographical scope of these areas'.¹⁶²

Further, defining the right to participate as a victim on the basis of the scope of the charges means that victims from many parts of Kenya affected by the PEV have been excluded from the participation regime. As one interviewee noted, 'the Molo and Kisii areas were not captured in the charges, but still the PEV victims there are equally victims'.¹⁶³ Accordingly, some respondent feel that 'victims are designed by the ICC, based on time frame, location [...] this is very constructed, limited'.¹⁶⁴ Some respondents also noted with concern that since no charges for SGBV have been brought in Case 1, 'women are not heard to the same extent as men [...] it is very frustrating'.¹⁶⁵

Respondents also emphasised that the right to participate in the ICC cases is sometimes determined by factors relating to developments in the ICC cases, which are seen as arbitrary by the victims. For example, one NGO expert stressed that some victims fell out of the scope of the cases following the confirmation of charges, and in this regard noted that it must have been 'hard for the LRV to explain this to these victims'.¹⁶⁶ The LRV in Case 2 similarly noted that 'we shouldn't kick out victims because the crimes committed against them no longer fall within the cases [...] let that person who was once admitted stay in [...] from a human perspective, once a victim, always a victim'. The LRV further observed that the charges are 'now so limited in the Kenyan case', in this regard noting that Police shootings no longer fall within the case.¹⁶⁷ Perhaps grounded in uncertainty concerning how to address the large number of PEV victims, the Court seems thus to have created a distinction between victims, which is viewed as artificial, or even politically motivated,¹⁶⁸ among the victims.

¹⁵⁸ However, the LRV also noted that it is in principle up to the VPRS 'to explain to situation victims why they are not victims in the cases'. Author's interview with the LRV in Case 2, Nairobi, June 2014.

¹⁵⁹ The LRV exemplified: 'One victim said it is not for the OTP to decide who suffered and who did not'. Author's interview with the LRV in Case 1, Nairobi, June 2014.

¹⁶⁰ For example, Author's interview with NGO representative (anonymous), Nairobi, June 2014.

¹⁶¹ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹⁶² Author's communications with expert on victims' issues in Kenya (anonymous), Nairobi, June 2014.

¹⁶³ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹⁶⁴ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹⁶⁵ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹⁶⁶ Author's interview with NGO representative (Elizabeth Evenson of Human Rights Watch), Nairobi, June 2014.

¹⁶⁷ Author's interview with the LRV in Case 2, Nairobi, June 2014. Kendall and Nouwen (2013: 245) also look critically at the ramifications of Police shootings no longer falling within the Kenyan ICC cases.

¹⁶⁸ Some respondents viewed the case/ situation victims distinction as linked to a more general problem of the ICC operating in a politicised manner: 'The Court is playing politics in Kenya [...] the selection of charges and [thus] victim status is influenced

Accordingly, the ICC participation regime in the Kenyan cases has resulted in the creation of four groups of victims: ICC case victims, ICC situation victims, non-registered PEV victims, and non-PEV political violence victims. The distinction between these categories of victims is often seen as artificial and arbitrary, and as will be discussed further below may further marginalise victims who are not allowed to participate in the cases and create tensions between different groups of victims.

4.6.2 Consequences for victims and their communities

Particular judges at the ICC have levelled criticism of the distinction between case and situation victims on the basis that it may create tensions between groups of victims. Judge Van den Wyngaert (2011: 492) observes:

Victims of uncharged crimes in situations that are before the court will not be able to participate. From the viewpoint of the victims, this means that only victims who happen to have been victimized in the locations that are the subject of the charges will be allowed to participate. This lack of equal access does not only affect the participation regime, but also the reparations regime. Only victims of crimes charged that lead to a conviction will be able to claim reparations. If the accused is acquitted, or if he cannot be apprehended, reparations will have to wait. For example, in the Uganda situation, with Joseph Kony and others still being fugitive, no participating victim has, at this point in time, any perspective of reparations. This may even have a negative impact on reconciliation, as victim groups belonging to different sides of a conflict may not always understand the legal intricacies of the system explained above, and may wonder why other victims can claim participation and reparations.

Many of the experts consulted for this Report shared Judge Van den Wyngaert's sentiments, for example noting that the distinction adopted by the Court 'creates tensions between registered victims and those who are not registered'.¹⁶⁹ A CBO representative further observed that 'when the LRV came out to talk with the case victims, there was a feeling among other victims that these victims were becoming privileged victims because this is where they get the information [on the ICC]'.¹⁷⁰ Similarly, some of the Nairobi based NGO experts noted that victims view the distinction as a form of 'discrimination' and ask 'why him/ her, not me'.¹⁷¹ This has 'created tensions' among victims, one NGO expert explained,¹⁷² while another observed that the 'distinction further victimises non-registered victims'.¹⁷³

Other respondents, however, disagree that the distinction creates tensions between victims. For example, one CBO representative, who works in an area where there are only situation victims, stated that situation victims 'understand why they cannot participate in the ICC cases'.¹⁷⁴ Similarly, the LRVs did not believe that operating with the distinction creates conflicts or tensions between the different groups of victims. The LRV in Case 1 explained: 'I wouldn't say that it [the distinction between case and situation victims] creates tensions in communities; that I haven't seen [...] non-registered victims don't have negative feelings towards those that have been registered'.¹⁷⁵ The LRV in Case 2 similarly noted: 'Victims who are not case

by the Prosecution's political considerations [...] the Court should have gone after mid-level perpetrators [...] as it is, victims cannot see the link between PEV crimes and the ICC cases'. Author's interview with NGO representative (anonymous), Nairobi, June 2014.

¹⁶⁹ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹⁷⁰ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹⁷¹ Author's interview with NGO representative (legal counsel, FIDA), Nairobi, June 2014.

¹⁷² Author's interview with NGO representative (legal counsel, FIDA), Nairobi, June 2014.

¹⁷³ Author's interview with NGO representative (anonymous), Nairobi, June 2014.

¹⁷⁴ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹⁷⁵ Author's interview with the LRV in Case 1, Nairobi, June 2014.



victims have no resentment towards registered case victims [...] they are humane for each other, and they have all already been through hell, so they [the situation victims] don't get too many bad reactions'.¹⁷⁶

4.6.3 What about the situation victims?

As such, the prevailing thinking among the respondents of this Report is that 'situation victims don't mean anything for the ICC; they are not participating in the proceedings [...] unless there is collective reparation from the Trust Fund, there is no benefit of being a situation victim'.¹⁷⁷ One respondent explained that since the Trust Fund is yet to become operational in Kenya, situation victims have been 'made empty promises over and over'.¹⁷⁸ Another respondent simply observed that 'the ICC just couldn't figure out what to do with the situation victims'.¹⁷⁹

Some interviewees viewed the challenges associated with 'recognising some victims as victims in the cases while not others [as] linked to the complementarity regime'.¹⁸⁰ While the implication is that situation victims should be recognised as victims and remedied at the national level, as discussed in Section 2.2, the challenge remains that there have only been very limited efforts to prosecute PEV perpetrators in Kenyan courts and in other ways provide a remedy to PEV victims.

However, some NGO experts emphasised that non-State actors could help situation victims obtain redress at the national level. In particular, the current efforts by some NGOs to pursue accountability and reparations through civil cases against the Government (as discussed in Section 2.2) was highlighted as an example of how civil society can complement the accountability process at the international level and thereby potentially help provide a level of redress for PEV victims who fall outside the scope of the ICC cases. Emphasising that 'lengthy proceedings in ICC is a problem' one respondent noted that local mechanisms are 'a priority for victims', in this regard pointing to the so-called 'IDP case' instigated by a group of civil society organisations against the government for failing to resettle IDPs and obtain reparation.¹⁸¹

4.7. The representation system

While some aspects of the system of representation used in the Kenyan ICC cases could be improved, overall, respondents felt that the system used in the Kenyan cases presents a significant step forward. As the LRV in Case 2 noted, the 'Kenya model is basically good, it just needs to be adjusted a bit'.¹⁸² In the following, some key aspects relating to the LRV system are discussed, including the requirement that the LRVs are based in Kenya, whereas the OPCV is mandated to make submissions on the LRVs' behalf in the

¹⁷⁶ Author's interview with the LRV in Case 2, Nairobi, June 2014.

¹⁷⁷ For example, anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

¹⁷⁸ Author's communications with expert on victims' issues in Kenya (anonymous), Nairobi, June 2014. Research conducted by others similarly question the legitimacy of the Trust Fund's absence in Kenya. KPTJ (2013: 8), for example, notes: 'On the website of the TFV, it is stated that this mandate "serves as a very immediate response to the urgent needs of victims and their communities who have suffered from the worst crimes in international law." In Kenya, this proves otherwise - and the response of the TFV for victims has been anything but "immediate"'.

¹⁷⁹ Author's interview with NGO representative (Elizabeth Evenson of Human Rights Watch), Nairobi, June 2014.

¹⁸⁰ Author's interview with NGO representative (anonymous), Nairobi, June 2014.

¹⁸¹ Author's interview with NGO representative (legal counsel, FIDA), Nairobi, June 2014.

¹⁸² Author's interview with the LRV in Case 2, Nairobi, June 2014. However, some respondents question the assumption that victims' views can adequately be reflected by LRVs. One expert noted: 'Even though [the victims] understand the role of [the LRV] and appreciate it, they wish that the Court could allow them to present their views in person [...] that's their real understanding of victim's participation as they argue if there were no victims there wouldn't be a case at ICC and so believe to be a very important party to the process [...] even if they are grateful that they can participate through their lawyer, most wish they could get a few representatives to present their views directly to the Court'. Author's communications with expert on victims' issues in Kenya (anonymous), Nairobi, June 2014.

courtroom; the LRVs' implementation of their mandates; and issues relating to funding and Court support for the LRVs.

4.7.1 LRV presence in Kenya and OPCV presence in the courtroom

The ability of LRVs to 'consult regularly with their clients to keep them informed of the proceedings and gather their views and concerns' has been pointed to by commentators as a key aspect of ensuring that the views of victims 'are effectively presented to the ICC' (AI & REDRESS, 2013: para 13). In line with this, there is general agreement among the respondents of this Report that it is beneficial that the 3 October decisions require the LRVs to be based in Kenya. As one NGO expert explains: 'It is an advantage that the LRVs are based in Kenya because this allows more contact with victims; it makes it more meaningful [...] unlike other cases, this adds support for a Court structure in a situation country.'¹⁸³ The LRV in Case 2 similarly observes that the presence of LRVs in the country is 'a good thing' because it gives the LRVs 'an understanding of the background and context'.¹⁸⁴

However, many interviewees felt that it is a major disadvantage of the representation system utilised in the Kenyan cases that the LRVs are not at the same time authorised to regularly be present and make submissions before the Chambers. As one NGO expert stated: 'I question whether this mixed system works [...] it is a disadvantage with this mixed model [...] I am curious how OPCV presence in The Hague impact perceptions of whether victims feel they are actually being represented [...] do victims even know about this system [i.e. the division of labour between the LRVs and the OPCV]? [...] it would be beneficial to have the LRVs in The Hague for all trial hearings, and then have a big support team in Kenya [...] this is realistic given the massive breaks in trial hearings'.¹⁸⁵ Similarly, the LRV in Case 2 noted: 'LRVs should be allowed to use their experience in the courtroom [...] you pay a lot of money for having experienced courtroom advocates as LRVs – their advocacy experience should be used in the courtroom [...] you can do both – being in Kenya to consult victims and be in the courtroom when trial hearings are on-going [because] there are so many breaks in international trials'.¹⁸⁶

Even those who accept that the OPCV should have a role in making submissions before the Chambers often criticise the Trial Chambers for having been too restrictive authorising LRV presence in the courtroom. The LRV in Case 1, for example, observes that the judges 'are being too restrictive authorising me to be in The Hague [...] there is a lack of understanding among the judges [concerning] the importance of the LRV being in The Hague'. He noted that this presents a significant challenge for making victims' participation 'real and meaningful': 'The problem is that on many occasions the judges have limited my time to question victims in the courtroom [...] the main problem is not the legal framework, but the judges' application of the rules'.¹⁸⁷

More specifically, there appears to be a variety of negative consequences of the existing practice whereby the Trial Chambers only exceptionally authorise LRV presence in the courtroom. For example, the LRV in Case 1 observed that this practice presents an obstacle for questioning witnesses in a qualified manner: 'I

¹⁸³ Author's interview with NGO representative (Elizabeth Evenson of Human Rights Watch), Nairobi, June 2014.

¹⁸⁴ The LRV further noted that 'future modalities of victim participation should be based on [LRV] presence in the countries'. Author's interview with the LRV in Case 2, Nairobi, June 2014.

¹⁸⁵ Elizabeth Evenson of Human Rights Watch), Nairobi, June 2014.

¹⁸⁶ The LRV added that future modalities of victim participation ought to give the LRVs 'more freedom to decide when they are present in The Hague', in this regard emphasising that it should be entirely up for the LRVs, not the judges, to decide when presence in the courtroom is required. Author's interview with the LRV in Case 2, Nairobi, June 2014.

¹⁸⁷ The LRV further expressed concern that the judges have not used clear guidelines to determine when the LRVs presence should be authorised: 'It is not coordinated when I can be in Hague; the judges have an unclear *ad hoc* approach'. Author's interview with the LRV in Case 1, Nairobi, June 2014.



need to be there for the entire testimony of a witness, not just when the Prosecution is done questioning, but the judges don't allow this'.¹⁸⁸ The LRV in Case 2 observed that 'when insider witnesses testify, it negatively impacts victims' interests if I were not allowed to be present and question the witnesses'.¹⁸⁹ Furthermore, one NGO expert observed that 'victims feel strange about the OPCV making submissions in The Hague'.¹⁹⁰

The above perceptions should be examined in light of more general concerns that the OPCV is 'taking over' tasks from the LRVs. For example, in an interview with the Institute for War and Peace Reporting, Raymond Brown, who represents victims from Darfur in the case against Sudanese president Omar al-Bashir, argues that there is a trend in the ICC system towards granting the OPCV a greater role in victim participation regimes at the costs of allowing victims a more direct say in the proceedings through their own lawyers, the effect of which 'is to make victims less visible and less dynamic in the victim participation process' (Evans-Pritchard et al., 2014). Kendall and Nouwen (2013: 249) make similar observations.

Some respondents of this Report further questioned whether OPCV counsels are fully equipped to provide qualified representation. While the LRV in Case 1 observed that the OPCV has provided 'good support to research', he also noted that the OPCV's 'court performance has been less impressive'. The LRV further mentioned logistical problems relating to the current model: 'The OPCV counsel seeks approval from me for any submission, which can be problematic when I am in the field and is time consuming [...] OPCV counsel are asking for too much detail; they are not independent enough'.¹⁹¹ The LRV in Case 2 also expressed some reservations with regard to the OPCV, noting that although the OPCV lawyer allocated to the case performs very well, the OPCV has not allocated to the case a senior courtroom advocate.¹⁹² A former LRV in the Kenya cases has raised similar concerns with respect to the OPCV system. In an interview with the Institute for War and Peace Reporting, Chana (who as noted above worked as the LRV in Case 1 before Nderitu was appointed) argues that compared to the OPCV, the LRVs are better placed to 'take a broader view and are more able to ask awkward questions'. She used her questioning of the Prosecutor's investigative methods in Kenya as an example, noting that 'this is the not the kind of argument that the OPCV would ever come up with' (Evans-Pritchard et al., 2014).

A further concern with the OPCV system mentioned by some experts relates to possible conflicts of interests arising out of the OPCV representing groups of victims who do not necessarily have the same interests. For example, a lawyer with experience of how the OPCV works interviewed by the Institute for War and Peace Reporting observes that in practice it can be difficult to keep cases separate within the OPCV: 'Basically anyone at the OPCV can have access to any of the evidence or any of the elements gathered by any of the two teams [...] They represent completely opposite interests but have exactly the same access to the same documents' (Evans-Pritchard et al., 2014). While the majority of the respondents of this Report did not question the OPCV's integrity, some did imply that there could be a potential conflict of interest because the OPCV is under the Registry and hence serve the LRVs as well as the Registry.

4.7.2 The LRVs' implementation of their mandate

The decision to have only *one* LRV appointed for each of the Kenyan cases raises a number of critical questions, including whether it is possible for the LRVs to actually represent the views of the many victims in the cases. While, as noted above, Article 68(3) of the Statute tasks the LRVs with presenting the 'views

¹⁸⁸ Author's interview with the LRV in Case 1, Nairobi, June 2014.

¹⁸⁹ Author's interview with the LRV in Case 2, Nairobi, June 2014.

¹⁹⁰ Author's interview with NGO representative (anonymous), Nairobi, June 2014).

¹⁹¹ Author's interview with the LRV in Case 1, Nairobi, June 2014.

¹⁹² Author's interview with the LRV in Case 2, Nairobi, June 2014.

and concerns' of victims, it remains questionable whether this is feasible given the number of victims in the Kenyan cases and possibly conflicting perceptions among them. As pointed to by REDRESS (2012: 36): 'Victims rarely speak with one voice [...] [e]ach will typically have his or her own interests and will have experienced victimisation in a unique way'. Further, to represent the views and concerns of victims, the LRVs must be in a position to regularly consult victims, but again this may not be practically possible due to the large volume of victims, in particular with respect to specific submissions to be made to the Chambers. As Tenove (2013b) notes, 'placing large numbers of victims in just a few groups can cause their different interests to be ignored, and individuals in large groups may have few opportunities to communicate with their representatives'. This begs the question whether the LRVs must represent the views and concerns as actually expressed by victims, or whether the LRVs should focus on advancing what they believe is in the broader interests of victims. As follows from the discussion below, the two LRVs in the Kenyan cases have adopted different approaches in this regard.

The LRV in Case 2 explained that he understands his mandate to involve periodic meetings with victims, which in practice means that he consults victim groups in four-month intervals, when possible. These consultations, according to the LRV, must 'be based on the principle of non-discrimination'. The LRV understands this to entail that 'each victim has the same rights', and further that in principle 'broad groups' of victims must be consulted, not only victims in particular regions. However, the LRV explained that this is not practically possible because 'around 20.000 victims fall within the scope of case 2, within a territory that is twice as big as Belgium, but with poor transport infrastructure'. Noting that he has 'not seen 96 % of the victims' he represents, the LRV accordingly observed that his mandate is 'difficult to fulfil because it is impossible to consult all victims'. He explained that budget limitations are a key challenge in this regard: 'It wouldn't have helped to have more LRVs in the Kenya cases, but you have got to give the LRVs the money they need' for consulting victims.¹⁹³

In light of the above considerations, the LRV in Case 2 elaborated on whether the LRVs ought to represent the views or more broadly the interests of victims. Emphasising that 'the client is the master', he stated that he 'strongly believes' that the LRVs must respect and loyally present the actual views expressed by victims, not his understanding of what best advances their interests to the extent there is a conflict. He exemplified noting that 'if the clients want the case to take place in The Hague or Arusha, it is my duty to communicate that view to the Court'. However, the LRV further explained that 'as a lawyer you have to think of legal avenues to promote the views and concerns expressed by victims'. In this regard he noted: 'You don't necessarily consult the victims on all technical aspects of the process, but make submissions that best promote the concerns they express [...] you find legal solutions that best promote their views'. He further observed that 'you cannot consult victims on all technical issues', and in this regard used the 'no case to answer motion' filed by the Kenyatta Defence as an example of 'something which is too technical for victims to understand and be consulted on'.¹⁹⁴

Asked what to do when there are conflicting views among the victims he represents, the LRV noted that while the level of support for the ICC trials seems to 'have diminished among victims in Case 1, in my case [i.e. Case 2] support for the ICC process remains extremely high'. The LRV further used the example relating to *in situ* hearings, noting that 'nearly all the victims [consulted] in Case 2 wanted the trials to take place in

¹⁹³ Author's interview with the LRV in Case 2, Nairobi, June 2014.

¹⁹⁴ Author's interview with the LRV in Case 2, Nairobi, June 2014.



The Hague’, but emphasised that ‘if you have diverging views, the correct approach is to communicate all relevant views to the Trial Chamber’.¹⁹⁵

The LRV in Case 1 has adopted a different approach. Emphasising that there are ‘big differences between the victims’ he represents, the LRV observed that it is ‘very difficult to represent so diverse views’. He further explained that he needs to ‘make a lot of balance, compromises, because of diverse views’, in this regard noting that ‘it would have been better to have more LRVs to take care of different victim groups [within the Case]’.¹⁹⁶

Furthermore, as opposed to the LRV in Case 2, the LRV in Case 1 believes that submissions should advance the *interests* of victims, also in a situation where (his understanding of) these interests conflict with the *views* actually expressed by victims. The LRV exemplifies: ‘The *in situ* question is an example of where I submitted contrary to what the victims stated they preferred’.¹⁹⁷ In his written submissions to the Chamber, the LRV requested the Trial Chamber to consider changing the venue of the trial to Arusha, Tanzania, notwithstanding that 82 % of the victims he consulted had stated a preference for the trials to be held in The Hague, while only 16 % stated a preference for conducting the trials in Arusha (and only 2 % a preference for conducting the trials in Kenya).¹⁹⁸ The LRV emphasised, among other issues, that a change of the place for trial to Arusha would ‘greatly mitigate’ the challenges he faces with respect to facilitating ‘meaningful participation by, and representation of, victims within an extremely limited budget’.¹⁹⁹ Being interviewed for this Report, the LRV explained that while ‘the *in situ* question caused a lot of drama, normally victims understand that their views cannot always be represented’.²⁰⁰ He justified this approach noting that ‘you explain to them, give them pro and cons and the broader picture, and they understand’.²⁰¹

Only few of the experts interviewed for this Report addressed the issue of whether the LRVs ought to represent the views or the interests of victims. However, one NGO expert stated her agreement with the approach taken by the LRV in Case 1. Using the LRVs submissions on the *in situ* question as an example, the respondent explained that ‘this was the correct approach by LRV, because he outlined the views of victims and then made submissions on what he believed was in their best interest’.²⁰² In contrast, another NGO expert observed that the approach of the LRV in Case 1 ‘is problematic’ because it implies that victims ‘don’t know what is best for them’.²⁰³

More generally, some NGO experts questioned whether the LRVs have been sufficiently consulting victims, and whether in implementing their mandate the LRVs have helped make participation meaningful. While not reflecting the view of the majority of respondents, one NGO expert noted: ‘I don’t even hear them [...] I can easily forget that they are even there [...] victims feel the same’. The interviewee further pointed to disparity between the submissions of the LRVs and the actual concerns of victims, emphasising that they often fail to ‘consult victims sufficiently’.²⁰⁴ Another NGO expert implied that there could be a differences

¹⁹⁵ Author’s interview with the LRV in Case 2, Nairobi, June 2014.

¹⁹⁶ Author’s interview with the LRV in Case 1, Nairobi, June 2014.

¹⁹⁷ Author’s interview with the LRV in Case 1, Nairobi, June 2014.

¹⁹⁸ ICC-01/09-01/11-620, para 5.

¹⁹⁹ ICC-01/09-01/11-620, para 14.

²⁰⁰ As another example of victims disagreeing with or questioning his submissions, the LRV noted that ‘some victims disagreed with my submissions on summoning witnesses to appear, saying that these witnesses can mess up the case’. Author’s interview with the LRV in Case 1, Nairobi, June 2014.

²⁰¹ Author’s interview with the LRV in Case 1, Nairobi, June 2014.

²⁰² Author’s interview with NGO representative (anonymous), Nairobi, June 2014.

²⁰³ Author’s interview with NGO representative (anonymous), Nairobi, June 2014.

²⁰⁴ Author’s interview with NGO representative (legal counsel, FIDA), Nairobi, June 2014.

between how the two LRVs' have implemented their mandate in terms of consulting victims, in this regard noting that 'in Case 2, there have been many efforts to consult victims [but] in Case 1 it has been insufficient'.²⁰⁵ Similarly, another respondent noted: 'The LRV in Case 2 is much more dedicated, and able to focus on the LRV job since he is not working on other cases, but the LRV in case 1 is trying to make a living and takes other cases [...] the system in Case 1 is not working because the LRV is losing a lot of private clients [due to his role as LRV] and goes through personal suffering'.²⁰⁶ This criticism raises the question of whether working as an LRV ought to be considered a full-time job, something which the LRV in Case 2 believes it should.²⁰⁷

While victims in Case 2 thus appear to have benefitted from more extensive consultation, some respondents noted that the LRV in Case 1 might be in a better position to understand the views and concerns of victims due to his Kenyan nationality: 'The LRV in Case 2 might not fully understand local dynamics, whereas [the LRV in Case 1] understands the tribal thing'.²⁰⁸ However, the LRV in Case 1 also addressed issues relating to the nationality and ethnicity of the LRVs, noting that there are sometimes challenges associated with being perceived as representing an ethnic group: 'At the very first meeting, a victim stood up and said, "you are a Kikuyu, we can't trust you" [...] I told him that from 2005, I had been the Chair of ICJ-Kenya; my credibility is high'.²⁰⁹

Additionally, respondents raised questions with respect to the LRVs' reliance on intermediaries. One NGO expert felt that using intermediaries to reach out to victims is 'necessary', because the ICC 'won't get more resources', but at the same time emphasised that relying on intermediaries is a 'real benefit because intermediaries have an understanding of what's going on with victims on an everyday basis'.²¹⁰ The LRVs themselves observed benefits as well as challenges associated with relying on intermediaries in their work. According to the LRV in Case 1, one problem is that 'some intermediaries tell victims to change their stories to fit into the case; they tailor-make stories [...] we had to stop working with some intermediaries'.²¹¹ The LRV in Case 2 observed: 'We rely on 6 [intermediaries] [...] my field staff identifies good intermediaries [...] they can tell if there is anyone at a meeting who should not be there and would, if necessary, be able to spot Government agents at meetings'.²¹²

Finally, some respondents reflected critically on the LRVs' association with the Court as a whole, one noting that the 'LRVs often draft their agenda based on the Court's interests, not victims'.²¹³ Similar concerns have been raised by academics. Haslam and Edmunds (2012), for example, argue that having a LRV system where the LRVs are unable to consult the majority of the clients they represent may make them more accountable to the judges and Registry than the victims, making them question whether the current system makes victim

²⁰⁵ Author's interview with NGO representative (anonymous), Nairobi, June 2014.

²⁰⁶ Author's interview with NGO representative (anonymous), Nairobi, June 2014. Similarly, another interviewee observed that 'the LRV in Case 2 'is very interested in the case, whereas [the LRV in Case 2] is not sufficiently engaged [...] victims feel that they don't meet him'. Author's interview with NGO representative (anonymous), Nairobi, June 2014.

²⁰⁷ The LRV noted that 'being a LRV is a full-time job [...] this should be a requirement'. Author's interview with the LRV in Case 2, Nairobi, June 2014.

²⁰⁸ Author's interview with NGO representative (anonymous), Nairobi, June 2014.

²⁰⁹ The LRV observed that whereas 'the ethnic dimensions are still there, it depends a lot on whether [the victims] agree with my submissions'. Author's interview with the LRV in Case 1, Nairobi, June 2014. However, the LRV in Case 2 observed that 'victims should be consulted whether they prefer a national or a foreigner', noting that 'in Case 2, the victims wanted a non-Kenyan due to integrity issues'. Author's interview with the LRV in Case 2, Nairobi, June 2014.

²¹⁰ Author's interview with NGO representative (Elizabeth Evenson of Human Rights Watch), Nairobi, June 2014.

²¹¹ Author's interview with the LRV in Case 1, Nairobi, June 2014.

²¹² However, he added that even if guidelines on intermediaries were recently published, they are not sufficiently clear. Author's interview with the LRV in Case 2, Nairobi, June 2014.

²¹³ Author's interview with NGO representative (anonymous), Nairobi, June 2014.



participation more symbolic than real. Connected to the above, some interviewees observed that victims ‘are mostly interested in restorative, not retributive justice, but working within the ICC system, the LRVs are forced to focus on retributive justice’.²¹⁴ This brings into question to what extent the LRVs can represent the views and concerns of victims in a system that ultimately focuses on bringing the perpetrators of international crimes to justice. As one NGO expert noted, ‘what should the LRV do if the victims are actually looking for an acquittal of the accused?’²¹⁵

4.7.3 Funding and Court support for the LRVs

Underfunding of the LRVs was pointed to as a key factor that has negatively impacted their ability to carry out their mandate, including consulting victims. For example, the LRV in Case 2 noted that the 3 October decisions have ‘massive budget implications’, but stated his regret that the Registry has failed to appreciate properly and in a timely manner the financial and human resources necessary to put the Trial Chamber’s model into effect: ‘the Registry needs to appreciate quickly and fully the budgetary implications of participation decisions [...] the Registry needs to understand the total budgetary impact of a specific model for victim representation ordered by the judges, and allocate sufficient funds to enable that model to be implemented on the ground’. Additionally, the LRV noted that the LRVs have ‘very tight budgets on field missions; we hire very modest venues for the meetings and incur very modest costs to cover lunch and transport for the victims’.²¹⁶ The LRV in Case 1 similarly expressed serious concern with regard to the amount of funding available: ‘The amount of money available for meetings with victims has been too limited [...] the Counsel Support Section (CSS) should understand how difficult it is to do meetings with victims with lack of resources [...] we [i.e. the LRVs] are only allowed to offer 500 KSH to participating victims, for their transport and drinks, but victims need food and drinks to show up to meetings’.²¹⁷

NGO experts generally agree with the views of the LRVs that the system does not receive sufficient funding. For example, one interviewee notes: ‘The victim participation system in Kenya was largely driven by funding concerns [...] the Court wanted to limit the costs of participation [...] the LRVs don’t have sufficient funding for regularly consulting victims’.²¹⁸ Other research projects relating to victims in Kenya have also suggested that the limited funding available for facilitating meetings with victims significantly restricts victims’ ability to meet their LRVs. KPTJ (2013: 5) argues: ‘The victims are unable to afford the transport costs associated with meeting their lawyers. Most of those who attend meetings with their lawyers report that they are no longer able to support themselves because they literally have to “start from scratch” in areas where they are perceived to be “outsiders”’. REDRESS (2012: 39) similarly notes that it is ‘important for the Registry to ensure that the common legal representative has the resources, capacity and support in the field to maintain constant communication with the “victim participants” to be represented’.

²¹⁴ Author’s interview with NGO representative (anonymous), Nairobi, June 2014.

²¹⁵ Author’s interview with NGO representative (anonymous), Nairobi, June 2014.

²¹⁶ Author’s interview with the LRV in Case 2, Nairobi, June 2014. In an interview with Institute for War and Peace Reporting the LRV further elaborates: ‘The main problem is that there are a very large number of victims to be consulted, and the resources which are made available by the court to the victims’ legal representative to do so are very modest’ (Evans-Pritchard et al., 2014),

²¹⁷ The LRV further noted that it is problematic that while his budget is covered by the CSS, he often has to pay from his ‘own pocket in the first place’ before being reimbursed at a later stage. Author’s interview with the LRV in Case 2, Nairobi, June 2014.

²¹⁸ Indeed, the respondent observes that the ‘biggest challenge’ for the LRV system in the Kenyan cases relates to lack of funding, and stressed that ‘States Parties are the problem’. Author’s interview with NGO representative (anonymous), Nairobi, June 2014.

Beyond issues relating to funding, it appears that the Court structure in support of victims and representation does not work optimally. In particular, the LRV in Case 2 raised serious questions relating to the performance of ICC organs that are intended to support to the LRV system:

Approval for field work by the CSS has an enormous impact for us [i.e. the LRVs] [...] They pay the bills, but do so in a manner which is very late and lacking in transparency [...] it is unfortunate that we often gain the impression that Staff members in the CSS are unsympathetic to the challenges of my mission and to victim representation generally [...] the OPCV and VPRS recruit staff who have specific expertise on victims issues. But those staff do not approve the financial costs of field missions. It is the CSS who currently approve field missions and office and residential costs in the field. It does so on the basis of legal aid policies, which are non-transparent and inaccessible to me, let alone the public. There is an urgent need for a comprehensive, public legal aid policy document for victim representation stating clearly what is covered and what is not covered [...] one problem with the CSS is that its approach reflect States Parties' reluctance to properly address victims' representation, which is reinforced through budget constraints created by States Parties. Too many Court organs are involved in dealing with victims' issues, including the VPRS, OPCV, CSS, VWS and the Trust Fund.²¹⁹

Finally, some respondents questioned the Chambers' receptivity to victims' concerns in the context of the trials. According to one NGO expert, it is a major problem in the Kenyan cases (and beyond) that the 'submissions of LRVs are not taken seriously by the Court'.²²⁰

4.8. Specific outcomes of victims' participation in the Kenyan ICC cases

There are multiple, sometimes conflicting understandings, among the respondents of this Report concerning the main benefits of the victim participation regime in the Kenyan ICC cases. In the following, respondents' understandings of the presumed benefits of participation are discussed in the context of assumptions made in the scholarship on victim participation at the ICC.

4.8.1 Participation as empowerment?

In the scholarship on victim participation, empowerment is generally viewed as a key benefit of participating in ICC cases and other TJ processes.²²¹ As Pena and Carayon (2013: 519) argue, victims' involvement 'not only is a "right" but also appears indispensable if post-conflict justice processes are to be restorative and capable of building the foundations for a strong transition through empowerment of those who were victimized during conflict'. The expert panel organised by Amnesty International and REDRESS concludes that '[a]llowing victims to participate meaningfully in the ICC's proceedings can, independently of any reparation outcomes, empower them' (AI & REDRESS, 2013: para 4). However, some Kenyan organisations have questioned whether lack of consultation with victims by the Court may disempower victims. KPTJ (2013: 7), for example, argues, '[t]oo often decisions are taken by the various organs of the Court and the judges without consulting the victims, compounding their general sense of disempowerment'. Moffett (2015) is also critical of the extent to which the Court actually considers the view of victims when making decisions. He notes that, '[D]espite innovative victim provisions, victims' interests have little impact on outcomes of the Court. Instead in order to ensure the Court is more

²¹⁹ Author's interview with the LRV in Case 2, Nairobi, June 2014.

²²⁰ Author's interview with NGO representative (anonymous), Nairobi, June 2014.

²²¹ As noted by Taylor (2014: 14-15), more broadly, TJ discourses tend to assume that 'participation equals empowerment'.



responsive to victims' understandings of justice it should give greater weight to their interests, which in turn is likely to improve their satisfaction with the ICC, as well as public confidence and legitimacy of the work of the Court.'

Whereas some respondents of this Report observed that the ICC's focus on the PEV means that 'victims of other political violence in Kenya feel marginalised',²²² interviewees generally felt that victims who participate in the Kenyan ICC cases are empowered. Indeed, many respondents feel that empowerment is the main advantage for victims of participating in the cases. Yet, respondents sometimes have diverging views as to why exactly participation empowers the victims that participate.

The LRV in Case 2 view empowerment as the 'most important impact', noting that he is 'trying to make them [i.e. the victims] feel that they have a voice'. He explains: 'Now I realise that the victims I meet are empowered [...] it is not only symbolic [...] they [i.e. the victims] get up, say something, I listen, and for many of them I am the only person from the ICC they will ever meet; it is their opportunity to finally speak on the ICC to someone who appears in the ICC courtroom [...] even if they believe now that the [Kenyatta] trial might never happen, they are empowered by telling that person what they think, often in forceful terms'.²²³ The LRV in Case 1 similarly notes that victims are empowered by participating, although he also remarked that there can be 'potentially negative consequences because of unmet expectations'.²²⁴

Most NGO experts similarly observe that victims are empowered by participating in the ICC cases. For example, one respondent emphasised that empowerment takes place because participation helps 'victims to understand the nature of the justice process', notably due to the information they are provided by the LRVs.²²⁵ Other respondents observed that empowerment primarily takes place through story-telling, as victims get a chance to tell other victims (and the LRVs) about the abuses they suffered during the PEV crisis and their current situation.²²⁶ Others again noted that empowerment mainly takes place as a consequence of the submissions made by the LRV before the Chambers: 'When victims are represented by the LRV, they see that the LRV represents them in Court; makes submissions; it empowers them'.²²⁷ Similarly, another interviewee noted that 'one advantage of the Kenya [participation] structure is that since outreach has been so limited, victims can see that the LRVs are important figures' as they make 'controversial' filings before the Court and take part in media interviews.²²⁸ The above statements correspond with the findings of Human Rights Center, UC Berkeley School of Law (2015: 52). Their study notes that, 'Nearly three-quarters of respondents in Kenya said that they felt they had a voice in the proceedings. Yet more than four dozen complained that they did not. For most Kenyan respondents, having a voice meant having a trusted advocate who would represent their views at the court'. Yet, some respondents of this Report argued that the use of in-court protective measures, including redactions in transcripts, limits empowerment because 'victims are frustrated that the information they provide is not coming out'.²²⁹

²²² Author's interview with NGO representative (legal counsel, FIDA), Nairobi, June 2014.

²²³ Author's interview with the LRV in Case 2, Nairobi, June 2014. In a lecture given in The Hague, the LRV further emphasised that empowerment takes place as a form of 'group therapy' when victims are enabled to share stories with each other (Global Justice, 2014).

²²⁴ Author's interview with the LRV in Case 1, Nairobi, June 2014.

²²⁵ However, the same respondent noted that because the level of knowledge 'is limited, so is empowerment'. Author's interview with NGO representative (anonymous), Nairobi, June 2014.

²²⁶ Author's interview with NGO representative (anonymous), Nairobi, June 2014.

²²⁷ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

²²⁸ Author's interview with NGO representative (Elizabeth Evenson of Human Rights Watch), Nairobi, June 2014.

²²⁹ The LRV in Case 1 further noted that the victims 'feel that even those who go to testify, it is not worth it, because no one hears what they say'. Author's interview with the LRV in Case 1, Nairobi, June 2014.

4.8.2 Does participation promote healing?

In the literature on victim participation, healing is sometimes labelled a likely outcome of victims' participation in ICC cases. For example, the Court's Revised Strategy in relation to Victims states that participation in the justice process 'is one step in the process of healing for individuals and societies'.²³⁰ However, scholars such as Mohan (2012: 182) do not find it likely that that criminal justice advances therapeutic goals.²³¹ Similarly, there are conflicting understandings among the respondents of this Report as to whether participation in the ICC cases promotes healing.

On the one hand, some respondents believe that victims' healing is an important outcome of participation. Indeed, according to the LRV in Case 1, the 'main purpose' of participation should be viewed in terms of the 'therapeutic effect' it has on victims.²³² One CBO representative similarly explains: 'There is hope for healing; it could happen; especially social interaction helps [...] to interact with other victims; it helps healing; there is a therapeutic effect [...] those who shared a common experience, when they gather at meetings, it helps, it heals'.²³³ Another respondent notes that 'there is healing, to some extent, by storytelling', but at the same time emphasises that 'more psycho-social services are needed; the ICC should do better, like we do on the national cases [i.e. the IDP case]'.²³⁴

Other respondents, however, were far more sceptical concerning the healing effect of participation. One NGO expert, for example, noted that healing does 'not really take place [because] it is a very personal thing; for some it comes for others not', further noting that the Kenyan cases are so political that there is less healing'.²³⁵ Another respondent noted that since there are victims from many different locations, testifying before the Court will not necessarily have 'that group therapy effect, it could have had in smaller communities'. The same respondent explicitly linked healing with the ability to testify before the Court: 'Healing only happens after victims testify [...] the lack of publicity around testimonies in the Kenya cases creates a problem'.²³⁶ Other research projects relating to victim participation in the Kenyan ICC cases have similarly concluded that many victims want to 'tell their story in the courtroom in order to prove that crimes happened or to have their personal suffering acknowledged' but because few victims are aware of how their views are summarised and presented, they often feel that 'their narratives of suffering were a resource for empowered outsiders' (Tenove, 2013b).

Other respondents specifically linked victims' potential healing to the political context in Kenya, while implying that criminal accountability may present an obstacle to healing: 'Kenyans are generally forgiving, so if the message of political leaders is forgiveness, it can contribute to the healing of victims [...] however, ICC prosecutions could hinder healing because of elite manipulation'.²³⁷

²³⁰ ICC, Assembly of States Parties, 'Court's Revised Strategy in relation to Victims', ICC-ASP/11/38, 5 November 2012, para 10.

²³¹ See further Taylor (2014: 17) for an analysis of the assumptions made in the scholarship with respect to victim participation and its impact on the healing of victims.

²³² Author's interview with the LRV in Case 1, Nairobi, June 2014.

²³³ However, the same respondent noted that 'sometimes it has the opposite effect, especially for those who suffered sexual violence'. Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014. Another respondent also observed that healing 'depends on the availability of socio-physical assistance'. Author's interview with NGO representative (legal counsel, FIDA), Nairobi, June 2014.

²³⁴ Author's interview with NGO representative (anonymous), Nairobi, June 2014.

²³⁵ Author's interview with NGO representative (anonymous), Nairobi, June 2014.

²³⁶ Author's interview with anonymous expert, Nairobi, June 2014.

²³⁷ Author's interview with NGO representative (anonymous), Nairobi, June 2014.



4.8.3 Is participation promoting reconciliation?

Respondents generally do not believe that victim participation in the Kenyan ICC cases has advanced reconciliation between communities in the country. Similarly, in the scholarship on participation in ICC cases, there is often, though not always, a level of scepticism that participating in these processes, in its own right, will bring about reconciliation.²³⁸

The general view among interviewees is that (inter-community) reconciliation depends more on the political context and the way the ICC cases are perceived and portrayed, than on victims' participation in these cases. As one NGO expert explains: 'Participation doesn't affect reconciliation [...] the ICC has only disintegrated further by taking a "case approach" [...] the ethnic nature of the case approach further creates tensions [...] there are still divisions between Kalenjin and Kikuyus'.²³⁹ In similar terms, another NGO expert observes that the 'political context undermines reconciliation because participation is linked to a criminal justice process that elites oppose'.²⁴⁰ A CBO representative further elaborates that 'the ICC has not led to reconciliation – in contrast, the Prosecution strategy of pursuing two cases, divided by ethnicity, has increased tensions between ethnic communities'.²⁴¹

Furthermore, the prospects of reconciliation appear to be closely linked to the outcome of trials, though it is not necessarily clear in which way. On the one hand, some respondents observe that an outcome of the trials whereby the accused are convicted could advance reconciliation. The LRV in Case 2, for example, argues that 'they haven't reconciled in Kenya, but a proper trial could possibly have brought about some reconciliation'.²⁴² On the other hand, many respondents feel that the pursuit of criminal accountability undermines reconciliation, especially because in Kenya the trials are viewed in ethnic terms. As one CBO representative argues, 'if Ruto is found guilty, the Kalenjin will be angry; there will be no reconciliation'.²⁴³ In similar terms an NGO expert observed: 'The ICC process brought Kikuyus and Kalenjins together, which brought reconciliation at the political level, but for the wrong reasons [...] if Ruto is convicted and Kenyatta not, there will be violence'.²⁴⁴

4.8.4 Participation as reparation?

Respondents generally agree that victims' participation in the Kenyan ICC cases cannot be viewed as a form of reparation in its own right, and yet victims often *expect* that participation will advance their chances of obtaining compensation.²⁴⁵ These expectations appear to constitute a major challenge for the participation regime. As one interviewee explains: 'The biggest challenge for participation is that victims still think that participation in the cases is linked to compensation [...] victims expectations are very high [in terms of compensation]; this is a failure of the system – victims should have been explained better about the

²³⁸ Pham et al. (2011: 284), for example, suggest that participation is unlikely to bring about reconciliation. See, however, Taylor (2014: 16) for a further discussion of how the literature addresses the issue of reconciliation as an outcome of participation in TJ mechanisms, including the ICC.

²³⁹ Author's interview with NGO representative (anonymous), Nairobi, June 2014.

²⁴⁰ Author's interview with NGO representative (anonymous), Nairobi, June 2014.

²⁴¹ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

²⁴² Author's interview with the LRV in Case 2, Nairobi, June 2014.

²⁴³ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

²⁴⁴ However, the same respondent emphasised that 'currently, in the absence of convictions, tensions are now less at the community level, due to the reconciliation at the political level'. The respondent further noted: 'This political reconciliation means that many or most victims no longer want the ICC cases to move on [...] it is seen as Western intervention, even among victims [...] elite reconciliation changed things on the ground [...] victims buy the anti-imperialist narrative of ICC'. Author's interview with NGO representative (legal counsel, FIDA), Nairobi, June 2014.

²⁴⁵ As one CBO representative noted, many victims see participation as a 'fishing net' for compensation. Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

differences'.²⁴⁶ Another respondent similarly emphasises that 'victims cannot understand that participation and reparation are not connected', and in this regard point to limited ICC outreach as being the major problem.²⁴⁷ The LRV in Case 2 also observe that although some groups of victims understand and appreciate discussing legal issues, many victims 'can't separate participation from reparation'.²⁴⁸ Indeed, a CBO representative implied that many victims would not be participating had they been compensated: 'The lack of compensation has led to bitterness among victims [...] if the Government had compensated victims, most would pull out of the ICC cases'.²⁴⁹

As discussed above in Section 4.1, most victims are primarily looking for reparation, and they perceive reparation mainly as a question of compensation. These desires of victims are not necessarily compatible with the expectations that other audiences have of the accountability process. As one NGO expert notes, while many NGOs and legal professionals hope that the outcome of cases 'will be deterrence through convictions, most victims don't agree with that; all they want is compensation'.²⁵⁰ The LRV in Case 1 also point to a level of disparity between the expectations of external audiences and victims: 'There are many different understandings of what is real, meaningful [...] for many victims it means reparation, while for external audiences it primarily relates to a credible justice process where victims' voices are heard in the courtroom'.²⁵¹ The LRV in Case 2 observes: 'Compensation is priority number one for victims, who have received almost no compensation from the Government of Kenya for the huge material losses and physical and psychological damage that they suffered'.²⁵²

Importantly, respondents generally argue that there *ought* to be a clearer link between participation and reparations, and many emphasise that compensation to victims should take place at an earlier stage of the proceedings. For example, the LRV in Case 1 notes: 'My personal take is that participation should have been linked to reparations [...] victims don't understand why reparation only becomes relevant in 3-4 years [from now] [...] to be meaningful, reparation should take place at an earlier stage'.²⁵³ Similarly, one NGO expert observes that 'perhaps it is wrong to separate participation and compensation [...] there should be a link to compensation; victims want compensation, not other forms of reparation or symbolic participation; their main concern is their financial situation'.²⁵⁴

More generally, respondents often express concern with regard to the existing scheme for reparation within the ICC system. According to the LRV in Case 2:

The general problem with reparations is that it is slow; it raises unrealistic expectations; and it could be divisive [...] you wonder whether it [i.e. the reparation regime] is worth it [...] ICC reparations sounds good, but has so far delivered nothing [...] the ICC spends a lot of money on the concept of reparation, but has so far delivered on the ground absolutely nothing [...] it may be better to leave the question of reparation in the form of livelihood assistance to development agencies that have development expertise and the personnel on the ground, and who can deliver

²⁴⁶ Author's interview with NGO representative (legal counsel, FIDA), Nairobi, June 2014.

²⁴⁷ Author's interview with NGO representative (anonymous), Nairobi, June 2014.

²⁴⁸ Author's interview with the LRV in Case 2, Nairobi, June 2014.

²⁴⁹ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

²⁵⁰ Author's interview with NGO representative (legal counsel, FIDA), Nairobi, June 2014.

²⁵¹ Author's interview with the LRV in Case 1, Nairobi, June 2014.

²⁵² Author's interview with the LRV in Case 2, Nairobi, June 2014.

²⁵³ Author's interview with the LRV in Case 1, Nairobi, June 2014.

²⁵⁴ Author's interview with NGO representative (legal counsel, FIDA), Nairobi, June 2014.



assistance immediately, rather than the ICC [...] we need to look again at the question of why the ICC is getting into what is essentially development work [...].²⁵⁵

Additionally, even if several respondents questioned the relevance of collective reparation, many reflected critically on the absence of Trust Fund intervention in Kenya to date. For example, a CBO representative observed that ‘the ICC should have brought in the Trust Fund in Kenya [...] it is discouraging when the Trust Fund says there is no money for Kenya’.²⁵⁶ The LRV in Case 1 observed: ‘There should be more focus on collective reparation [...] at the same time, it is a problem that collective reparation, such as building a hospital, also benefits perpetrators [...] it is a dilemma that increases [due to the] number of participating victims [as it] means that it is difficult to offer real, individual reparation to participating victims [...] the problem is that the Trust Fund has too limited budget’.²⁵⁷ Similarly, a CBO representative noted that Trust Fund and hence collective reparation is misplaced: ‘It is important that compensation from the Trust Fund actually benefits victims, not just all community members, because there are perpetrators there also, but can the Trust Fund do this?’.²⁵⁸ Another CBO representative noted that ‘victims want individual compensation, not collective, but this is very rare in the ICC and the Trust Fund focuses on small collective projects like social support; this is not what victims want’.²⁵⁹ Moffett (2015) makes some interesting observations as to how the prospects of collective reparation may have impacted victims’ interests in participating in the Kenyan cases: ‘The reparations decision has impacted other victims’ perceptions of the Court in meaningfully responding to their interests. This is apparent in the Kenyan case of *Ruto and Sang*, whereby at least 47 victims have pulled out of participating at the Court. One of predominate issues they cited for pulling out was that reparations would be ordered collectively, such as the construction of a hospital, meaning that perpetrators who continue to live near victims would be able to benefit from the harm they caused.’

4.8.5 Participation as a way of revealing the truth?

Commentators have often emphasised that victim participation promotes truth-finding in the context of ICC trials. The expert panel organised by Amnesty International and REDRESS (2013, para 4), for example, concludes that victims ‘can provide important factual and cultural context regarding the crimes and their impact, which can also contribute to establishing the truth, as well as an historical record of events’. Pena and Carayon (2013) also argue that victim participation contributes to truth-finding in the trials, notably by adding facts and legal arguments that are not addressed by the Prosecutor or defence.²⁶⁰ ICC chambers have similarly pointed out that victim participation can assist the judges to better understand the contentious issues of the case in light of victims’ local knowledge and socio-cultural background,²⁶¹ and that victims can help ‘shed new light on the events which took place,’ providing the Trial Chamber with ‘a clearer picture of the existing family, ethnic and social networks there’ as well as ‘new and useful information about possible methods of selecting houses to attack based on ethnicity.’²⁶²

²⁵⁵ The LRV used the South Nyanza area as an example, noting that ‘this is a very poor area [...] you ask the ICC to come into the area and improve the situation, but the ICC doesn’t have development expertise’. Author’s interview with the LRV in Case 2, Nairobi, June 2014.

²⁵⁶ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

²⁵⁷ Author’s interview with the LRV in Case 1, Nairobi, June 2014.

²⁵⁸ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

²⁵⁹ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

²⁶⁰ See further Taylor (2014: 16) for an analysis of the claims made in the scholarship concerning the linkages between participation and truth-telling and/or truth-seeking.

²⁶¹ ICC-01/04-01/07-1665-Corr, para. 82.

²⁶² ICC-01/04-01/07-2517, paras. 15–16, 18.

Similarly, there is general agreement among the respondents of this Report that the participation regime helps revealing the truth by way of the submissions made by the LRVs before the Chambers and/ or victims' ability to testify before the Court.²⁶³ In particular, interviewees emphasised that the LRVs' submissions and victims' testimonies can help change the narrative of the nature of the crimes, which is otherwise primarily delivered by the Prosecution. For example, according to one CBO representative, 'the truth is often shaped by the Prosecution, so when the LRV speaks about what victims want, or when they testify, it helps change the narrative; it gives voice to victims'.²⁶⁴ The formality associated with LRV submissions seems important in this regard. One NGO expert explains: Participation promotes truth-telling through LRV submission, and 'formality is important in terms of documentation'.²⁶⁵ Another respondent observes that 'truth is the major benefit because victims testimonies and LRV submissions can offer a contextual understanding for the judges', noting that victims add perspectives to the Prosecution's presentation of the case.²⁶⁶

The above perceptions raise questions as to whether victims should primarily participate for their own benefit, or whether participation should first and foremost be seen as something that benefits the justice process in a broader sense. As Kendall and Nouwen (2013: 239-41) observe, academics and practitioners alike tend to view victim participation as something that benefits victims; that a central justification of international criminal justice should be to render justice to victims, and that participation plays a key role in this regard. However, if truth-telling primarily benefits the justice process itself by providing the judges with a clearer picture of what occurred, and only to a lesser extent benefits the more specific interests of victims, this brings into question whether victims may end up being instruments, rather than beneficiaries, of a justice process that is to a large extent justified in advancing their interests. As Moffett (2015) argues: '[T]here is a danger that victims' interests could become secondary to the truth which the ICC is interested in, making them just functional to the Court's agenda. Moreover, it is hard to reconcile the Court's goal of determining the truth under Article 69(3) in allowing victims to participate, yet denying their requests to expand the charges against [a] defendant to provide a more representative and truthful account of their crimes. This may further indicate that victim participation under Article 69(3) serves more the interests of the Court rather than victims'.

Some respondents, however, observed that victims and the communities in which they live may also benefit directly from participation through truth-telling, as 'victims talk more about the PEV to others at the community level due to participation', thus enabling a more thorough and accurate understanding in communities concerning the nature of the PEV.²⁶⁷

4.8.6 Is participation serving justice?

There are diverging views as to whether participation in the Kenyan ICC cases serve justice, in part because there are different understandings of what should be understood by the term 'justice' and whom it should serve.

According to some respondents, justice is being served for victims already by way of the ICC's intervention in Kenya. As one NGO expert noted, 'when a case is filed, victims feel that justice will be served [...] legal

²⁶³ Some respondents, however, were not convinced that victims' participation significantly contributes to truth-telling. The LRV in Case 2, for example, noted that truth-telling cannot be viewed as a likely outcome of victims' participation because the LRVs are 'not meant to investigate' and do not have the resources to do, in this regard emphasising that 'either do a good investigation or none at all'. Author's interview with the LRV in Case 2, Nairobi, June 2014.

²⁶⁴ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

²⁶⁵ Author's interview with NGO representative (anonymous), Nairobi, June 2014.

²⁶⁶ The respondent exemplified with the DRC cases, noting that LRV submissions helped 'clarify names; who are who in the case'. Author's interview with NGO representative (Elizabeth Evenson of Human Rights Watch), Nairobi, June 2014.

²⁶⁷ Author's interview with NGO representative (legal counsel, FIDA), Nairobi, June 2014.



filings give victims some feeling of justice’.²⁶⁸ Others emphasise that justice is being served for victims by way of the LRVs’ activities. One NGO expert explains: ‘Most victims feel that participation does help serve justice [...] some victims feel that LRVs do a much better job than the Prosecution, especially in terms of explaining the ICC process abroad.’²⁶⁹ Further, some respondents link the question of whether justice is being served by way of victims’ participation with its impact on the justice process as a whole. For example, one NGO expert noted that ‘a main benefit of participation could be to contribute to the effectiveness of the proceedings’, and it could promote a fair justice process as well as the ‘general goal of justice being seen to be done’.²⁷⁰

However, most interviewees explicitly link a potential ‘justice outcome’ with the outcome of the cases. As one NGO expert states: ‘There is a form of justice for victims already when poor people see powerful people have to explain themselves, but if the cases end in acquittals, victims will be disappointed about participation [...] there is a close link between the success of participation and the outcome of criminal cases [...] acquittals will have a worse impact on victims than if the Prosecution just dropped the charges’.²⁷¹ Yet, as discussed elsewhere in this Report, a significant proportion of the victims no longer want convictions, especially following the 2013 elections. The LRV in Case 1, for example, notes that ‘most Kikuyu victims support the Jubilee Government [and] some Kalenjin victims no longer want Ruto convicted after the Jubilee Government came to power’.²⁷² Some NGO experts also link victims’ perceptions of whether justice is being served to the ethnicity of the accused, noting that while some victims are still looking for convictions, this only concerns those of the accused who do not belong to their own ethnic group.²⁷³ Accordingly, the outcome of the trials is clearly important for victims’ understandings of whether justice is being served, but at the same time many victims are no longer desiring convictions, at least when it comes to members of their own ethnic group. This finding may stand partly in contrast to other situations. On the basis of consultations with ICC victims in four countries subject to ICC investigation, the Human Rights Center, UC Berkeley School of Law (2015: 3) concludes that ‘[m]ost victim participants said that they expected the court to deliver convictions and that they would be disappointed by anything less.’

Furthermore, there appears to have been a significant change over time concerning victims’ perceptions as to whether the ICC cases help serve justice, which is connected to developments at the political level. One respondent explains: ‘Since two of the three suspects took over power some victims have lost hope that justice will ever be served [...] others aren’t sure whether to continue pursuing justice outside Kenya, arguing that the two antagonizing communities are now together; and there are so many peace campaigns going on at the grassroots level so continuing with [the ICC cases] is seen as a way of undermining the peace process’.²⁷⁴

4.8.7 Participation and victims’ security

According to the ICC’s Revised Strategy in relation to Victims, the Court shall ‘[p]rovide protection, support and assistance to victims interacting with the Court in order to safeguard their security, psychological and physical integrity and well-being; ensure respect for their dignity and privacy; and prevent them from

²⁶⁸ Author’s interview with NGO representative (legal counsel, FIDA), Nairobi, June 2014.

²⁶⁹ The respondent made reference to the participation of the LRV in Case 2 in the 2013 Assembly of States Parties as well as the media interviews the LRV has taken part in, which in her view has helped disseminate ‘a picture of the ICC process from a victims’ perspective, rather than from the accused’s perspectives’. Author’s interview with NGO representative (anonymous), Nairobi, June 2014.

²⁷⁰ Author’s interview with NGO representative (Elizabeth Evenson of Human Rights Watch), Nairobi, June 2014.

²⁷¹ Author’s interview with NGO representative (anonymous), Nairobi, June 2014.

²⁷² Author’s interview with the LRV in Case 1, Nairobi, June 2014.

²⁷³ Author’s interview with NGO representative (anonymous), Nairobi, June 2014.

²⁷⁴ Author’s communications with expert on victims’ issues in Kenya (anonymous), Nairobi, June 2014.

suffering further harm as a result of their interaction with the Court'.²⁷⁵ Yet, it seems clear that victims who participate in the Kenyan ICC cases often face threats to their personal security. According to the ICPC (undated), PEV victims 'have more often than not been targeted and have received threats from goons allied to the suspects at the Court [...] victims have been misconceived to be witnesses therefore they have been subjected to violent attacks'.

Most respondents of this Report observe that the security challenges for victims have escalated since Kenyatta and Ruto gained power in 2013, and that these security concerns have had a negative impact on victims' willingness to participate in the cases. As one NGO expert explains: 'Earlier, security was not really a problem for victims, but recently it has become [...] fewer victims now want to participate because of security risks'.²⁷⁶ Similarly, a CBO representative notes: 'Anything that has to do with the ICC, people think you are against the establishment; also for victims [...] many victims have withdrawn because of security [concerns] [...] victims have to oppose the ICC not to be affected by security risks'.²⁷⁷

Furthermore, particular rulings by ICC Chambers may inadvertently increase the risks faced by victims. For example, one CBO representative argues that the Trial Chamber's decision to summon witnesses in the Ruto and Sang case has deteriorated the situation for victims: 'This decision changed a lot for victims; the dynamics changed, so now victims cannot feel safe [...] when Bensouda was trying to get new witnesses, it became more difficult, more insecure'.²⁷⁸ However, while developments in the ICC cases may have had ramifications for the security of victims, there is uncertainty concerning what potential acquittals would mean for victims' security. Some respondents suggest that 'if there are acquittals, the Government might use this as an excuse to strengthen power and further intimidate victims, especially those who came out strongly with their views'.²⁷⁹ Yet others imply that acquittals would reduce the risks of victims.

Some respondents explicitly blame the accused for the on-going intimidation of witnesses and victims. According to one CBO representative, 'it is a big problem that the suspect – Kenyatta – interferes with the Court; it undermines justice and victims don't see the purpose of participating anymore'.²⁸⁰ Regardless of whether the accused and/ or the Kenyan Government are directly involved in the intimidation of witnesses and victims, participating victims often face harassment from fellow community members. One respondent emphasised that this intimidation of victims is partly caused by confusion in communities concerning the difference between being a witness and a participating victim.²⁸¹ Some respondents additionally pointed out that victims look to what happens to witnesses and hence feel even more intimidated: 'Bribery and intimidation of witnesses took away faith in the ICC; it now just looks like a Kenyan court [...] victims see witnesses as "superior", and see how they are being intimidated; they think, if the ICC cannot even protect

²⁷⁵ ICC, Assembly of States Parties, 'Court's Revised Strategy in relation to Victims', ICC-ASP/11/38, 5 November 2012, para 19.

²⁷⁶ The respondent illustrated with the recent arrest of Journalist for Justice staff and the intimidation of victims that had been consulted that followed. Author's interview with NGO representative (anonymous), Nairobi, June 2014.

²⁷⁷ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

²⁷⁸ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

²⁷⁹ Author's interview with NGO representative (anonymous), Nairobi, June 2014.

²⁸⁰ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014. In contrast, the LRV in Case 1 observed that 'the Kenyan Government has not interfered with victims'. He further observed that while participation 'mostly has negative implications for security', the 'security consequences now are not as "hot" as they were last year when Kenyatta and Ruto took power'. He added that whereas Kenya's National Intelligence Service interrupted a meeting with victims last year, 'things have since calmed down'. Author's interview with the LRV in Case 1, Nairobi, June 2014.

²⁸¹ The respondent noted that 'witnesses are being harassed and threatened, and so are some victims because community members do not distinguish between witnesses and victims'. Author's interview with NGO representative (legal counsel, FIDA), Nairobi, June 2014.



a witness how can they protect me’.²⁸² The security risks for participating victims appear to be most outspoken in areas where victims and perpetrators live next to each other.²⁸³

Insufficient ICC protection mechanisms for victims constitute a significant problem for their security and hence willingness to participate as victims in the ICC cases. As one NGO expert observes, ‘ICC witness and victims protection is poor [...] anyone who engages with the ICC, including victims, is in great danger [...] the ICC has too limited resources to protect, and the current political environment means that it is not possible to have very candid and open participation [...] some victims regret having registered’.²⁸⁴ Another expert notes that the ICC ‘was slow in recognising that strong protection mechanisms are needed in the Kenya cases’.²⁸⁵ The narrow definition of victims seems to pose a further problem. As one respondent explains: ‘It is a problem that only the victims who are registered can get protection; those who are not registered don’t receive any protection [...] even for witnesses and victims who receive protection, it only goes to the immediate family, but in Africa we have extended families, and they [the Government and its agents] can intimidate the extended family’.²⁸⁶

The above findings correspond with the conclusions of Human Rights Center, UC Berkeley School of Law (2015: 4), which notes that participating victims in Kenya ‘feared that they could be targeted for violence because of their association with the ICC and its representatives’, and ‘instances of intimidation and witness disappearances led victim participants to fear that the accused could use the apparatus of the state to target them.’ The study further notes (56) that the vast majority of participating victims consulted in Kenya ‘expressed trepidation about their safety after so many witnesses began to withdraw from the cases’; respondents ‘said that they feared reprisals from a diversity of actors, including government authorities, other ethnic groups, as well as local thugs sympathetic to the accused’; and as a result, many respondents expressed some hesitancy about meeting with ICC staff, said they felt apprehensive about testifying in The Hague if they were asked, and raised concerns about keeping their identities confidential in light of what most saw as government campaigns to identify them’.

²⁸² Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

²⁸³ The LRV in Case 2, for example, observed that ‘in some areas, like Nakuru, people [i.e. Kalenjin victims] are nervous because they are surrounded by Kikuyus’. Author’s interview with the LRV in Case 2, Nairobi, June 2014.

²⁸⁴ Author’s interview with NGO representative (anonymous), Nairobi, June 2014.

²⁸⁵ Author’s interview with NGO representative (Elizabeth Evenson of Human Rights Watch), Nairobi, June 2014.

²⁸⁶ Anonymous participant (CBO representative) in workshop organised by Impunity Watch, Nairobi, June 2014.

5. Conclusions

As noted by Tenove (2013b), on the one hand '[a]cademics and civil society organizations tend to want more extensive participation', but on the other hand, some States Parties have started to question whether victim participation is 'a money pit, capable of costing much and adding little to the Court's core functions'. Similarly, some ICC judges have raised critical questions concerning the appropriateness of having victims participate in ICC proceedings. Given these conflicting perceptions as to the value of victims' participation in ICC cases, assessments of the benefits and challenges of victim participation are important for offering policy guidance to States Parties, civil society actors and others with an interest in the ICC's victim participation regime, and more broadly victims' engagement with TJ mechanisms.

In the following, the Report elaborates on how the findings of this Report correspond with the hypotheses identified by IW, as mentioned at the outset of this Report, which is followed by a more detailed summary of the key findings of this Project.

Revisiting the hypotheses

- 'More empirical evidence is needed: (a) on the "virtues" of participation; and (b) whether, and how, participation leads to the benefits that are commonly assumed': Whereas this Report has used Kenya as a case study to amplify the benefits and challenges associated with victims' participation in specific ICC proceedings, it seems clear that more empirical – and comparative – research is needed to clarify victims' preferences and experiences of victim participation regimes in different situations. This Report has demonstrated how victims' priorities can change over time and are contingent on numerous factors not directly related to the set-up of a regime for victims' participation, notably the political and social context in which it operates. Accordingly, future research on victims' participation must pay attention to such dynamics, including the question of how mechanisms of TJ can best adapt to changing circumstances (or in the first place make sure that circumstances relevant to victim participation do not deteriorate). In Kenya, the length of the proceedings in the Kenyan ICC cases combined with Government opposition (and manipulation) of the accountability process has significantly undermined the goals of victim participation and many victims have lost interest in the cases or no longer support their continuation.
- 'Participation can take different forms during the lifespan of a TJ mechanism; more information to understand the basic 'enabling conditions' for participation is needed': Having examined the system of participation adopted in the Kenyan ICC cases, it is clear that victims' participation has indeed taken different forms over the lifespan of the ICC process, with the most notable change taking place following the Trial Chamber's decisions of 3 October 2012. However, the findings of this Report indicate that victims have often lacked knowledge, partly due to insufficient ICC outreach, concerning the implications of such changes. Further, this Report has identified a number of 'enabling conditions' for meaningful participation – key among them the need to make sure that the basic needs of participating victims are first met. Additionally, the findings of this Report indicate that the lifespan of the ICC process in the Kenyan cases has been problematic from the viewpoint of victims, in particular because the length of the process, with the changes occurring over time, has exposed them to significant uncertainty and security risks, and because the ICC has been unable to fully protect the victims.



- ‘Representation, indirect participation and notification are forms of participation’: While the findings from Kenya illustrate that representing victims through a legal representative at the ICC is a relevant form of participation, the findings also indicate that the system of representation can be optimised in various ways to make victims’ experiences of the participation process more meaningful. Notwithstanding the contributions of the LRVs towards making participation meaningful, profound questions such as the extent to which victims should be allowed to testify before the Chambers and whether the LRVs should represent the views or the interests of victims need to be further clarified. Further, while in-court protective measures and redactions to transcripts are often necessary in a situation such as Kenya, it is important to keep in mind that such measures may partially undermine the goals of victim participation. Moreover, to enhance victims’ experiences of participation through representation, the LRVs ought to be granted more flexibility in terms of appearing in the courtroom.
- ‘Victim participation has inflated expectations, and has simultaneously divided and homogenised victims’: The findings of this Report strongly suggest that victims’ expectations to participation were inflated from the outset, for a large part due to insufficient ICC outreach. Significantly, many victims have associated participation with receiving compensation, something that has contributed to disappointment or indifference towards the process of participation at later stages. With regards to causing divisions or homogenisation among victims, the Court’s distinction between case and situation victims is seen as artificial and arbitrary, and has seemingly further marginalised victims who are not allowed to participate in the cases and to some extent led to tensions between different groups of victims. More broadly, the ICC’s distinction between different types of victims can be seen as having created four categories of victims: ICC case victims, ICC situation victims, non-registered PEV victims, and non-PEV political violence victims. The ICC process has impacted very differently upon these four groups, and victims – as well as other stakeholders – often fail to understand or disagree with the justifications for making such distinctions.
- ‘Information and outreach are crucial for meaningful victim participation’: The findings of this Report confirm the significance of making information about the ICC and the participation regime widely available to victims. As noted above, insufficient outreach from the Court’s side has constituted a major obstacle for making participation meaningful.
- ‘To make it meaningful, victims’ participation in a TJ mechanism should be complemented by other measures and processes’: Victims in Kenya often continue to live under harsh conditions, unable to meet their basic needs. Accordingly, victims primarily look for compensation and other forms of support to improve their livelihood, meaning that participation in the absence of a compensation scheme and/ or other forms of support significantly undermines victims’ perceptions of the value of participation. Further, while the ICC is the only available mechanism for pursuing criminal accountability for the PEV, it is noteworthy that many victims would have preferred credible domestic TJ processes.

The needs of PEV victims in Kenya and the relevance of participating in the ICC cases

It is hard to speak about victims’ needs in a generic sense, since the victims of the PEV have different needs, depending, for example, on where they live and the nature of the abuses committed against them. However, the most imminent needs of PEV victims relate to livelihood and meeting basic needs, not pursuing accountability and being allowed to participate in the ICC cases. Accordingly, most PEV victims prioritise reparation, in particular monetary compensation, over other remedies, including participation in the ICC cases. For that reason, it is clear that many victims registered as victims because they believed that

doing so would help them obtain compensation, and that many have been disappointed with the continued absence of any Court intervention to advance collective or individual reparations. The level of support for the ICC among victims has declined significantly over time, especially since Kenyatta and Ruto gained power in 2013.

To advance more meaningful participation, it is important that the basic needs of victims are first met and that they are compensated before (or while) engaging in a lengthy participation process. However, this does not mean that participation in the ICC cases should be dismissed as entirely irrelevant. As discussed further below, participation in the Kenyan ICC cases has indeed had a number of positive outcomes, such as empowering victims in a political context characterised by lack of support for remedying them and, more broadly, the absence of support for credible TJ mechanisms.

Victims' knowledge of the ICC and the impact of outreach

Obtaining clear and consistent information about the ICC is vital for advancing meaningful participation. However, in Kenya, victims' knowledge of the ICC and the framework for participation is generally poor. While participating victims' knowledge is better than the victims not participating in the ICC cases and some improvements have taken place over time, lack of knowledge has constituted a serious obstacle for meaningful participation. This raises serious questions concerning the scope and quality of ICC outreach activities.

The ICC, especially in the early phases of the process, failed to conduct sufficient outreach. This resulted in NGOs and the LRVs for a large part taking upon their shoulders the task of carrying out outreach work. As a consequence of limited ICC outreach, victims have often misunderstood the nature and rules of the participation regime and developed unrealistic expectations concerning what the ICC can achieve, including in terms of reparations. The ICC should have planned and coordinated its outreach activities better, and more funding within the Court structure is needed for conducting outreach that meets the demands in a situation such as Kenya. Yet, some factors that are at least partly beyond the control of the Court, such as the Government's manipulation of the ICC process, have also proven an obstacle to advancing a better knowledge among victims concerning the ICC cases.

The registration process

The process of registering as a victim for participation in the Kenyan ICC cases has faced significant challenges. In particular in the early phases of the process, victims lacked information and were often confused about how to register and the purpose thereof. A key challenge in this regard concerns lack of consistency in the registration process, including the Court's continued altering of the forms used for registration. While the Chamber's decision of 3 October 2012 to adopt a simplified registration process under the LRVs' presents a positive step for making participation more accessible to victims, additional funding and more clarification from the Chambers' side is needed with respect to how the LRVs should implement their mandate.

The distinction between case and situation victims

The Court's distinction between case and situation victims, which is based on whether victims fall within the scope of the charges, is problematic. For example, as noted above, the Kenyan Police was reportedly responsible for around one-third of the total PEV casualties, but since no charges were confirmed for police violence, victims of such violence are considered situation victims and have therefore not been granted the possibility to participate in the cases. While some limitations concerning victims' admittance to the



participation process are clearly necessary, victims in Kenya tend to view the distinction as arbitrary and often fail to understand it. This has had a negative impact on victims' understanding of the ICC, which may in some situations have created tensions between different groups of victims. Accordingly, the ICC's distinction between different types of victims can be seen as having created four categories of victims (ICC case victims, ICC situation victims, non-registered PEV victims, and non-PEV political violence victims), a distinction which are often seen as artificial by victims who do not understand the justifications for distinguishing between victims in this way, or feel that affording different groups different privileges is not justified.

The LRV system

It is an advantage that the Chamber required the LRVs to be based in Kenya, in particular because it facilitates more regular consultation with the victims. However, ensuring sufficient consultations with victims also requires that the LRVs receive adequate funding in this regard, something which has not happened in the Kenyan cases. Further, to make the representation system more efficient and meaningful, the LRVs must be allowed to be present in the courtroom on a regular basis, perhaps even consistently, during trial hearings, something which has not been authorised by the Chambers in the Kenyan cases. This brings into question whether it is recommendable to adopt a framework where the OPCV is mandated to make submissions on the LRVs behalf in The Hague. Further, while having only one LRV appointed for each case can in principle be a suitable approach, this means that numerous victims, who may have conflicting interests, are represented as a group. This also raises questions as to whether the LRVs should adopt an approach whereby they attempt to represent the views victims actually express or instead attempt to advance the general interests of the victims as a group. The two LRVs in the Kenyan cases have adopted different approaches in this regard, which highlights the need for additional clarification from the Chambers' side concerning the methods (and purposes) of victim participation.

Specific outcomes of participation

- **Empowerment:** As such, empowerment of victims has been one, if not the main, benefit of participating in the Kenyan ICC cases, for example because victim participation allows victims to access information relating to the justice process and get together to tell their stories.
- **Healing:** It is questionable whether participating in the ICC cases, in its own right, contributes to the healing of victims, though this may difficult to determine in a general sense since healing is a highly individual process.
- **Reconciliation:** It does not appear that victims' participation in the ICC cases has advanced reconciliation between communities, partly due to the political context in Kenya, including perceptions that the accountability process is ethnically biased.
- **Reparation:** Participation in the ICC cases is not viewed as a form of reparation in its own right, but many victims *want* to see a closer connection between participation and reparation, in particular compensation.
- **Truth:** Participation helps revealing the truth, and whereas there are various understandings of why this happens, LRV submissions before the Chambers is a key factor in this regard.

- **Serving justice:** There are conflicting views as to whether participation in the ICC cases helps serve justice, but it seems clear that the outcome of the trials will significantly affect perceptions in this regard.
- **Security:** Participation in the Kenyan ICC cases has had a negative impact on victims' security, especially since Kenyatta and Ruto gained power in 2013, thus decreasing their willingness (or ability) to participate in the cases.

General considerations

The benefits and challenges of victims' participation cannot be understood in isolation from the broader developments in ICC cases and the political and social context in which they take place. In Kenya, challenges relating to taking the cases forward and the hostile attitude of the Kenyan authorities towards the ICC have significantly undermined the goals of victim participation. Factors that have created obstacles to meaningful participation include a perception that the ICC cases are 'falling apart'; a perception that the accountability process is ethnically biased; the Kenyan Government's manipulation of the ICC process; and lack of compensation and other measures to remedy the often poor situation of victims. Whereas the ICC has been 'the only game in town' in terms of advancing criminal accountability, the process has in the view of some ultimately materialised as one of 'non-justice',²⁸⁷ as charges have been withdrawn or not confirmed against suspects due to witness interference, poor investigation, the Kenyan Government's success in undermining the process, and for other reasons. Accordingly, victims' perception of the value of participation not only depends on the availability of other remedies, notably compensation, but is also highly contingent on the success of the accountability process as a whole, the political climate in which it unfolds and victims' changing preferences, including political ones, over time.

One particularly important lesson of this study therefore is that the specific political context has a significant impact on victims' experiences of victim participation. In so far as the relevant government takes a hostile attitude towards the accountability process, including portraying the ICC as a tool of foreign intervention, this can significantly impact victims' faith in the process. When the government and/ or supporters of the accused succeed in spreading the perception that the accountability process is politicised and aims at targeting particular ethnic groups, this may further result in decreased support for the ICC in the general population as well as among victims and limit their willingness to participate in the process. Equally important, if the Government fails to take adequate measures to protect witnesses and victims – or is even seen to encourage the intimidation of witnesses and victims – victims are likely to reconsider their willingness to participate in the ICC cases due to the real or perceived risks to their personal security associated therewith. Regardless of whether the accused and/ or the Kenyan government are directly involved in the intimidation of witnesses and victims, it is important to note that participating victims in the Kenyan ICC cases have frequently been harassed by fellow community members, something which can likewise limit their willingness to participate in the ICC cases. Furthermore, when victims have not received reparation, which is often their primary concern, the ultimate outcome may be that many victims become indifferent towards the ICC process or prefer not participate in the cases.

The above raises questions as to whether the ICC provided sufficient protection mechanisms for victims participating in the Kenyan ICC cases. After all, the situation was so sensitive that security analysts in the Registry advised against hiring Kenyans for ICC activities because it would be impossible to protect them (Human Rights Center, UC Berkeley School of Law, 2015: 48). In the view of respondents of this Report, ICC

²⁸⁷ A term used by the LRV in Case 2. Author's interview with the LRV in Case 2, Nairobi, June 2014.



witness and victims protection in the Kenyan cases has generally been poor, in part because the Court lacks resources to protect and in part because the Court was slow to recognise that strong protection mechanisms were needed in the Kenyan cases. Furthermore, the fact that the Court can only provide registered victims with protection inevitably presents security challenges for other categories of victims in a situation such as Kenya where strong anti-ICC sentiments prevail among the political class and community members.

More fundamentally, the above brings into question whether one should view victim participation as a neutral and de-politicised process. As noted by Kendall and Nouwen (2013), the Court – and many of the actors that support it – tend to view participation as an apolitical process that provides ‘the victims’, who, as a group, support criminal accountability, with a voice. However, the experiences from Kenya indicate that victims’ support for accountability processes and their interest in participating therein varies significantly over time and place, depending for a large part on factors that are essentially political.

6. Recommendations

To the ICC:

- Ensure that the person(s) responsible for outreach in-country are of sufficient experience and profile to be able to effectively manage the (potential) political manipulation of victim participation and the manipulation of the ICC process as a whole.
- Ensure that sufficient resources for outreach are provided; that comprehensive, context-specific outreach activities are carried out over the entire life-span of ICC processes, including the early phases of an investigation; and that the various ICC organs involved in outreach coordinate their activities to facilitate that victims in different locations obtain clear, consistent and comprehensible information, free from political manipulation, about the Court and its regime for victim participation.
- Ensure that victims obtain sufficient, but concise, information about the registration process; that the actual process for registration is simple and consistent; if the LRVs are to register case victims, that they receive sufficient resources and support from the Court to facilitate this task; and that information about the outcome of victims' applications is communicated to victims in a timely and consistent manner.
- Consult victims prior to appointing their LRVs; adopt systems of representation where the LRVs are required to be based in-country, but allow greater flexibility in terms of their presence in the courtroom than authorised in the Kenyan cases; ensure that the LRVs receive sufficient funding for conducting regular meetings with victims as well as for travelling to the seat of the Court to take part in hearings; ensure that the LRVs receive adequate and qualified support from Court sections, including the VPRS, OPCV, CSS, and consider simplifying the Court structure in this regard.
- Ensure that intermediaries used by the Court in outreach activities as well as intermediaries relied upon by the LRVs are vetted, and that they receive sufficient training and support to enhance their ability to carry out their tasks; provide sufficient security for intermediaries; consider revising the guidelines on intermediaries so they apply to all intermediaries used by Court organs and the LRVs.
- While it may be unfeasible to adopt an approach where victims are not divided into groups of case and situation victims, make sure that the distinction is applied in a manner not seen as arbitrary by victims, for example by allowing that once admitted as a case victim, a victim will continue to be a case victim (regardless of possible amendments of the charges); provide more support and outreach for situation victims, including ensuring that, where possible, they benefit from Trust Fund activities.
- To make participation meaningful for victims, ensure that participating victims benefit from Court assistance at an early stage, notably by ensuring that they benefit from Trust Fund activities pending the outcome of potential reparation hearings.
- Provide adequate security measures for all participating victims.



To State Parties:

- Maintain support, including financial support, for meaningful victims' participation in ICC cases, rather than simply pursuing less costly solutions.
- Provide adequate resources to the Court organs involved with victims' issues, including the VPRS, OPCV, CSS and the Trust Fund, as well as the LRV system.
- To make participation meaningful for victims, ensure that participating victims benefit from Court assistance at an earlier stage, notably by ensuring that they benefit from Trust Fund activities pending the outcome of potential reparation hearings; accordingly ensure that the Trust Fund is provided with sufficient resources.

To the Government of Kenya:

- Establish a comprehensive reparations programme, in order to provide all PEV victims with adequate compensation for the harm suffered.
- Provide other forms of reparations, including an official apology for the abuses committed by the Government, medical assistance to the victim, and ensure that victims still living in IDP camps are urgently re-settled and receive adequate support in this regard.
- Cooperate with and assist Court organs involved with victims' issues.

To civil society groups:

- While the ICC has the primary responsibility for adequate outreach, engage with victims throughout the lifespan of ICC investigations in order to help them understand the nature and consequences of participation and the broader justice process.
- Disseminate clear and concise information to victims concerning ICC cases and the legal framework that governs them, in particular in situations where actors opposed to the ICC spread misinformation about the process.
- In realisation of the limitations of the ICC's participation regime, take initiatives that can help victims, including victims not participating in the ICC cases, to obtain remedies, including reparation, truth and accountability.
- Consult victims with respect to their interests, preferences and the challenges they face, and use this information to help inform various organs of the Court involved with victims' issues.

7. Postscript

The findings of this Report must be viewed in light of significant developments taking place following its conclusion in November 2014. For reasons further detailed below, charges have been withdrawn or vacated in all of the ICC cases relating to the post-election violence, resulting that victims, including those who had participated in the cases, will likely be left with no remedies by the ICC. As the Kenyan authorities are unlikely to commence new prosecutions of post-election violence crimes and reparation efforts at the domestic level have been limited, many victims may be left with no remedy at all.

Kenyatta case

Following the conclusion of this Report in November 2014, important developments have taken place in the case against Kenyatta.

On 3 December 2014, the Trial Chamber rejected the Prosecution's application for a further adjournment, and directed the Prosecution to file a notice, within one week of the decision, indicating either: (i) its withdrawal of the charges in the case; or (ii) that the evidentiary basis has improved to a degree which would justify proceeding to trial.²⁸⁸ The Chamber noted that while 'it might ordinarily be appropriate to set a new date for trial', in this case 'it would be contrary to the interests of justice for the Prosecution to proceed to trial in circumstances where it believes it will not be in a position to present evidence sufficient to prove the guilt of the accused beyond reasonable doubt', and in this regard stated its view that 'the appropriate course of action would now be the prompt withdrawal of charges'.²⁸⁹ With respect to the Prosecution's submissions that the alleged non-compliance or obstruction on the part of the Kenyan Government can be attributed to Kenyatta, and that the requested adjournment would therefore not be contrary to the rights of the accused, the Chamber stated that the Prosecution 'has conceded that it has no evidence to support such an allegation', and if there were they would 'most appropriately be addressed through proceedings under Article 70 of the Statute'.²⁹⁰ The Chamber also made some comments relating to the interests of victims, emphasising that 'in the context of criminal proceedings, the interests of victims must be balanced with other interests of justice'.²⁹¹ In this regard, the Chamber noted that while the victims' legitimate interests include seeing those responsible for the crimes committed being held accountable, it would not be in the interests of justice, or the interests of the victims, for the current proceedings to be continued on 'the speculative basis which has been presented'.²⁹²

In light of the Chamber's decision, on 5 December 2014 the Prosecution notified the Chamber that it was withdrawing the charges against Kenyatta.²⁹³ In this regard, the Prosecution stated that the evidence 'has not improved to such an extent that Mr Kenyatta's alleged criminal responsibility can be proven beyond reasonable doubt'.²⁹⁴ For this reason, and in light of the Trial Chamber's rejection of the Prosecution's request for an adjournment until the Government of Kenya complies with its co-operation obligations under

²⁸⁸ ICC-01/09-02/11-981.

²⁸⁹ ICC-01/09-02/11-981, para 61.

²⁹⁰ ICC-01/09-02/11-981, para 53.

²⁹¹ ICC-01/09-02/11-981, para 55.

²⁹² ICC-01/09-02/11-981, para 55.

²⁹³ ICC-01/09-02/11-983.

²⁹⁴ ICC-01/09-02/11-983, para 2.



the Rome Statute, the Prosecution notified the Chamber that it was withdrawing its charges.²⁹⁵

On 9 December 2014, the LRV in the case filed his response to the Prosecution's notice of withdrawal of the charges against Kenyatta.²⁹⁶ In the strongly worded filing, the LRV noted that surviving victims have received no justice from the Kenyan criminal justice system, and that if the 'Prosecution now also walks away from them, it will betray thousands who have already had their lives torn asunder'.²⁹⁷ Among other issues, the LRV observed that it was 'time for the Prosecution to reintensify its investigation into the crimes committed in Naivasha and Nakuru, and to charge others who participated in those crimes', noting that it should prosecute 'those responsible for police and sexual and gender based violence ('SGBV') crimes committed during the PEV' as well as 'those responsible for interference with witnesses in this case'.²⁹⁸ The LRV concluded that the 'Court has delivered to the victims of this case not one of the three basic elements of justice that victims are entitled to expect: a formal declaration of the truth by the Court regarding the crimes committed against them during the PEV; to have those who victimized them held accountable; and to receive just and prompt reparation'.²⁹⁹ Nearly seven years after the crimes and after three years of proceedings, the LRV noted, 'victims in this case have received no truth, accountability or reparation from the Court', nor have they received any 'general assistance', which falls within the mandate of the Trust Fund for Victims.³⁰⁰ In sum, the LRV observed that the victims 'have received almost nothing from the entire ICC process', and it 'would be difficult for the Prosecution to convincingly argue that it is on the side of the victims – especially victims of rape – in this or future cases'.³⁰¹

In a development related to the above, on 3 December 2014, the Chamber issued its decision on the Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute.³⁰² While the Chamber found that there were 'serious concerns regarding certain aspects of the Kenyan Government's approach to the cooperation, it was 'not persuaded that the circumstances warrant referral on the basis of exhaustion of judicial measures at this stage'.³⁰³ Accordingly, the Chamber did not consider it appropriate to make a referral of the matter to the ASP on this occasion'.³⁰⁴

Following the Prosecution's filing of an application for leave to appeal the Trial Chamber's decision, which was granted,³⁰⁵ on 19 August 2015 the Appeals Chamber reversed the Trial Chamber's decision.³⁰⁶ The Appeals Chamber observed that the scope of a Chamber's discretion under article 87(7) of the Statute includes whether to make a finding of a failure to comply with a request for cooperation by a State, which prevents the Court from exercising its powers and functions under the Statute, as well as determining whether it is appropriate to refer the matter to the Assembly of States Parties or the Security Council 'in order to seek external assistance to obtain cooperation with the request at issue or to otherwise address the lack of cooperation by the requested State'.³⁰⁷ Having reviewed the Trial Chamber's decision, the

²⁹⁵ ICC-01/09-02/11-983, para 2. The Prosecution noted that the withdrawal was 'without prejudice to the possibility of bringing new charges against Mr Kenyatta "at a later date, based on the same or similar factual circumstances, should [the Prosecution] obtain sufficient evidence to support such a course of action"'. ICC-01/09-02/11-983, para 3.

²⁹⁶ ICC-01/09-02/11-984.

²⁹⁷ ICC-01/09-02/11-984, para 3.

²⁹⁸ ICC-01/09-02/11-984, para 5.

²⁹⁹ ICC-01/09-02/11-984, para 56.

³⁰⁰ ICC-01/09-02/11-984, para 56.

³⁰¹ ICC-01/09-02/11-984, paras 56-57.

³⁰² ICC-01/09-02/11-982.

³⁰³ ICC-01/09-02/11-982, para 89.

³⁰⁴ ICC-01/09-02/11-982, para 90.

³⁰⁵ ICC-01/09-02/11-985.

³⁰⁶ ICC-01/09-02/11-1032.

³⁰⁷ ICC-01/09-02/11-1032, para 1.

Appeals Chamber stated its view that ‘the Chamber of first instance, being intimately familiar with the entirety of the proceedings, is generally better placed to identify and assess the relevant facts and circumstances in the context of the case in order to decide whether engaging external actors under article 87 (7) of the Statute would be an effective measure to foster cooperation’, and stated that it was unable to make the ‘necessary finding on whether or not to refer the matter to the ASP in the absence of a conclusive determination by the Trial Chamber of the factual prerequisite for such a referral, which is void of any errors of law’.³⁰⁸ Accordingly, the Appeals Chamber considered it appropriate to remand the impugned decision for the Trial Chamber to determine whether Kenya has failed to comply with a cooperation request that has prevented the Court from exercising its functions and powers under the Statute and decide, if that is the case, whether or not to refer the matter to the ASP.³⁰⁹ The Chamber decided that in determining ‘whether there was a failure to cooperate within the terms of the first clause of article 87(7), the Trial Chamber should take into account all relevant factors, including the evidence that was required in the cooperation request and the conduct of the parties to the proceedings’, but also stated that the Trial Chamber should avoid conflating the criminal proceedings against Kenyatta with the proceedings under article 87(7) and ‘determine whether, at the time of the Impugned Decision, judicial measures to obtain the cooperation had been exhausted and consultations had reached a deadlock’.³¹⁰ It further decided that if the Trial Chamber concludes that there has been such a failure to comply with a cooperation request, the Trial Chamber ‘should make an assessment of whether a referral of Kenya to the ASP would be an appropriate measure to seek assistance to obtain the requested cooperation or otherwise address the lack of compliance by Kenya, taking into account, inter alia, considerations and factors referred to in paragraph 53 above’.³¹¹ As of May 2016, the Trial Chamber was yet to make a ruling on the matter.

Ruto and Sang case

Similarly, following the conclusion of this Report in November 2014, important developments have taken place in the case against Ruto and Sang.

Following the closing of the Prosecution case, on 23 October 2015 the Ruto Defence requested the Chamber to enter a judgment of acquittal in respect of the three counts of crimes against humanity Ruto was charged with,³¹² and on 26 October 2015 the Sang Defence filed a motion requesting the Chamber to ‘dismiss the case at this stage’.³¹³ On 20 November 2015, the Prosecution filed its response, opposing the two Defence motions, noting that the evidence presented, taken at its highest, is sufficient to satisfy a reasonable trial chamber that ‘all of the essential elements required to secure a conviction of both Accused’ are proved.³¹⁴ Further, on 27 November 2015, the LRV filed a joint response to the Ruto and Sang motions, submitting that they be rejected.³¹⁵

On 5 April 2016, Trial Chamber V(A) delivered its decision on the defence applications for a ruling of no case to answer and acquittal of the accused. On the basis of the evidential review set out in Judge Fremr’s reasons and the reasons indicated separately by Judge Fremr and Judge Eboe-Osuji, the Chamber decided

³⁰⁸ ICC-01/09-02/11-1032, para 93.

³⁰⁹ ICC-01/09-02/11-1032, para 94.

³¹⁰ ICC-01/09-02/11-1032, para 95.

³¹¹ ICC-01/09-02/11-1032, para 96.

³¹² ICC-01/09-01/11-1990-Conf. On 26 October 2015, the Ruto Defence filed a corrected version as well as a public redacted version. See ICC-01/09-01/11-1990-Conf-Corr and ICC-01/09-01/11-1990-Corr-Red, respectively.

³¹³ ICC-01/09-01/11-1991-Conf. A public redacted version was filed on 6 November 2015. See ICC-01/09-01/11-1991-Red.

³¹⁴ ICC-01/09-01/11-2000-Red2, para 436.

³¹⁵ ICC-01/09-01/11-2005-Conf. A public redacted version was filed on 29 January 2016. See ICC-01/09-01/11-2005-Red.



by majority, Judge Carbuccia dissenting,³¹⁶ that the charges against the accused be vacated and the accused discharged ‘without prejudice to their prosecution afresh in future’.³¹⁷

In Judge Fremr’s review of the evidence it was emphasised that the Prosecution had built its case around the allegation that a ‘Network’ existed, which satisfied the requirement under Article 7(2)(a) of the Rome Statute of an organisational policy, as allegedly demonstrated by: i) a series of preparatory meetings held at Ruto’s house; ii) the training of the Kalenjin youth; iii) the obtaining of firearms for the purpose of implementing the post-election violence; iv) the similar nature and patterns of the attacks, including indications of prior planning by and involvement of Network members with close links to Ruto; and, v) the subsequent cleansing ceremony in a particular location’.³¹⁸ Having reviewed the Prosecution’s evidence in this regard, Judge Fremr concluded that ‘no reasonable Trial Chamber could conclude that the alleged elements prove the existence of the Network and/or the common plan’.³¹⁹

Importantly, Judge Fremr and Judge Eboe-Osuji agreed there had been ‘a disturbing level of interference with witnesses, as well as inappropriate attempts at the political level to meddle with the trial and to affect its outcome’ which had ‘an effect on the proceedings and appear to have influenced the Prosecution’s ability to produce more (credible) testimonies’.³²⁰

Concerning reparations to victims, Judge Fremr noted that as ‘a result of the case ending without a conviction, no reparations order can be made by this Court pursuant to Article 75 for the benefit of victims of the post-election violence’.³²¹ Although Judge Fremr stated that this ‘must be dissatisfactory to the victims’, he held that ‘a criminal court can only address compensation for harm suffered as a result of crimes if such crimes have been found to have taken place and the person standing trial for his or her participation in those crimes is found guilty’.³²² In contrast, Judge Eboe-Osuji stated his ‘firm view that the victims of the post-election violence should not be left in the cold, because the proceedings before this Chamber were polluted by undue interference and political meddling which obscured an accurate assessment of the criminal responsibility of the accused’.³²³ Noting that the question of ‘reparation or ex gratia assistance in lieu of reparation for the victims of the Kenyan post-election violence of 2007-2008 is ripe for examination without further delay’,³²⁴ Judge Eboe-Osuji concluded that the parties and the Government of Kenya ought to make submissions on issues relating to reparation.³²⁵ As of May 2016, no order had been issued by the Chamber concerning obtaining the views of the parties on reparation issues.

Judge Carbuccia issued a dissenting opinion, holding that the charges against both accused should not have been vacated in the present case as the Prosecution’s case had not ‘broken down’ and there was ‘sufficient evidence upon which, if accepted, a reasonable Trial Chamber could convict the accused’.³²⁶

As of May 2016, the Prosecution had not appealed the Trial Chamber’s decision, meaning that the charges against Ruto and Sang are vacated.

³¹⁶ ICC-01/09-01/11-2027-AnxI.

³¹⁷ ICC-01/09-01/11-2027 (decision on defence applications for judgments of acquittal).

³¹⁸ ICC-01/09-01/11-2027-Red (reasons of Judge Fremr), para 33, citing ICC-01/09-01/11-2000-Red2, para. 152.

³¹⁹ ICC-01/09-01/11-2027-Red (reasons of Judge Fremr), para 118.

³²⁰ ICC-01/09-01/11-2027-Red (reasons of Judge Fremr), para 147.

³²¹ ICC-01/09-01/11-2027-Red (reasons of Judge Fremr), para 149.

³²² ICC-01/09-01/11-2027-Red (reasons of Judge Fremr), paras 149-150.

³²³ ICC-01/09-01/11-2027-Red (reasons of Judge Eboe-Osuji), para 198.

³²⁴ ICC-01/09-01/11-2027-Red (reasons of Judge Eboe-Osuji), para 203.

³²⁵ ICC-01/09-01/11-2027-Red (reasons of Judge Eboe-Osuji), para 209.

³²⁶ ICC-01/09-01/11-2027-AnxI, para 2.

Finally, on 2 May 2016, the Ruto defence requested the Trial Chamber to order the Prosecution to appoint an amicus prosecutor to investigate, with a view to initiating criminal prosecution, Prosecution witnesses, Prosecution intermediaries, and possibly ICC staff members, for offences against the administration of justice, contrary to Article 70 of the Rome Statute.³²⁷ The Defence submitted that evidence suggested that a number of Prosecution witnesses had deliberately given false testimony to the Chamber and tampered or interfered with the Prosecution's collection of evidence.³²⁸ In addition, the Defence submitted that ICC staff members may have engaged in sexual relations with witnesses and their families and other serious misconduct.³²⁹ As of May 2016, no decision had been rendered on the request.

Updated victims' numbers

In the Kenyatta case, the most recent report (January 2015) stated that 839 victims had been verified by the LRV as falling within the scope of the case,³³⁰ whereas of 23 March 2016, 954 victims had been verified by the LRV as falling within the scope of the case in the Ruto and Sang case.³³¹ On 3 May 2016, the Registry informed the Pre-Trial Chamber that the total number of forms received in relation to the 'situation' was 5,807.³³²

Interference with witnesses and Article 70 cases

Although as discussed above all of the cases relating to crimes committed in the context of the post-election violence have now collapsed, as of May 2016 the Court has issued arrest warrants against three Kenyans for their alleged interference with ICC witnesses. All of the suspects – Walter Barasa, Paul Gicheru and Philip Kipkoech Bett – are yet to be arrested and transferred to the Court. Commenting on these so-called Article 70 cases, the Prosecutor emphasised how the difficulties associated with gathering sufficient evidence in the Kenyan cases was connected to the intimidation of victims: 'The Office's independent and impartial investigations and prosecutions in the Kenya situation have been methodically undermined by a relentless campaign that has targeted individuals who are perceived to be Prosecution witnesses, with threats or offers of bribes, to dissuade them from testifying or persuade witnesses to recant their prior testimony. As a result, potential witnesses have been too scared to come forward, while others who gave statements have subsequently sought to withdraw from the process, citing intimidation.'³³³

Developments concerning domestic justice measures

In January 2015, the Kenyan Judiciary confirmed that it will establish an International and Organised Crimes Division (ICD) within its High Court in the first quarter of 2015 (Wayamo Foundation, 2015), but as of May 2016 the ICD was yet to become operational. Following a statement by Kenya's Director of Public Prosecution in 2014 that no further post-election violence cases can be prosecuted in Kenyan courts, in March 2015 President Kenyatta stated that post-election violence victims will see no further accountability, but a fund to assist them will be established (Daily Nation, 2015). More than a year after this declaration, this fund is still yet to be established.

³²⁷ ICC-01/09-01/11-2018-red, para 1.

³²⁸ ICC-01/09-01/11-2018-red, para 2.

³²⁹ ICC-01/09-01/11-2018-red, para 3.

³³⁰ ICC-01/09-02/11-998-AnxA.

³³¹ ICC-01/09-01/11-2026, para 1.

³³² ICC-01/09-161.

³³³ Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the unsealing of Arrest Warrants in the Kenya situation, 10 September 2015, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-10-09-2015-2>.



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Annexes

Annex 1: Questionnaire for experts and practitioners consulted

Introduction

My name is Thomas Obel Hansen. I am working on a research project for the Netherlands-based organisation, Impunity Watch. We are collecting information here in Kenya to learn more about people's perceptions of transitional justice in Kenya, specifically victims' participation in the ICC cases. The information collected will help us understand what people, specifically victims, believe is important in terms of participation in transitional justice processes, and will be used to write a research paper that will make recommendations on future processes of transitional justice. The research here in Kenya relating to the ICC is complemented by similar research relating to other transitional justice mechanisms in other countries, including Burundi, Cambodia, Guatemala and Honduras.

I would like to ask you to participate in a one-on-one interview. I would like to ask a number of questions, which will take about 45 minutes to complete. There are no right or wrong answers to the questions. I would like to simply understand your opinion on a number of subjects relating to victims' participation in the ICC cases in Kenya.

Your identity and the answers that you give will all be kept confidential and your name will not be written down or made known to anyone else than me, if you so choose as per the consent form. The only persons who will have access to the answers that you give will be the researchers working on this project. Your name and other personal details will not be cited anywhere in any publication. The publications will simply refer to respondents in a generic sense so that none of the participants, including you, can be identified.

None of the researchers involved in the project are affiliated with the Government or the ICC or any stakeholders directly involved in the ICC cases (including the Legal Representative, the Prosecution and the Defence), and no information will be handed over to any such stakeholder or person acting on their behalf. The researchers on this project work for non-governmental organisations and have no direct interest in the outcome of the ICC cases, nor do they have any influence thereon.

Your participation in this study is voluntary and you will not receive any money or any other form of benefits if you decide to participate. You are free at any time to refuse to answer any question. You are free to stop the interview at any time. Refusing to answer or stopping the interview will not affect you in any way.

If anything is unclear or if you need me to repeat any of the questions, then please stop me at any time. Do you have any questions before we begin? You may ask questions about this study at any time.

Interview questions:

- Can you briefly explain what you know about the ICC rules/ framework relating to victim participation?
- What is your opinion about the modality of victim participation established by the 3 October 2012 decision in the Kenya cases?
- What do you think is the most appropriate way for victims to participate in the proceedings? Are there alternative ways for victims to participate? Should participation be different at different stages of the proceedings?
- What do you think is the purpose of victim participation, and do you agree with this purpose?
- Overall, do you believe that participating in the proceedings meets the expectations of PEV victims and is meaningful for them? (*Probe: Why (not)?*)
- As such, do you see any benefits/ advantages for victims to participate?
- As such, do you see any negative consequences for victims to participate?
- Do you think victims feel that participating empowers them, and do you believe that they have a voice in the proceedings? (*Probe: Why (not)?*)
- Do you think victims feel that participating in the proceedings contribute to their healing, or in contrast make them feel worse?
- Do you think that victim participation in the proceedings has contributed to revealing the truth of what happened during the PEV crisis?
- Do you think that justice has been served as a direct consequence of victims' participation in the proceedings, and if so how?

-
- Do you think that victim participation is a form of reparation (or satisfaction)?
 - Do you think that victim participation has contributed to reconciliation in communities affected by the PEV, or has it in contrast escalated tensions?
 - Do you think victims feeling of safety or security have been affected as a direct consequence of applying / participating?
 - Do you think victim participation has been constructed in a way as to make victims feel safer?
 - Do you think that the promise of victim participation has inflated expectations among victims?
 - Do you believe that all victims are represented in the proceedings and do you think that the interests of all victims are represented?
 - What can / should be done for victims who are unable to participate or have their applications rejected?
 - What is your opinion of the work of the Legal Representatives?
 - Do you think that the Legal Representatives have consulted victims sufficiently and represent their views and concerns accurately and appropriately?
 - Do you have ideas for how to improve victim participation in the proceedings?
 - Besides the ICC, do you think there are there other measures or initiatives for truth, justice or reparations that are important for victims (and which may or may not have been established in Kenya)?
 - Do you have ideas or proposals for other measures or initiatives that could be created in Kenya in order to address the PEV and meet the needs of victims?

Additional interview questions for Legal Representatives:

- What challenges do you face as a legal representative?
- Have you or the victims you represent experienced any safety or security concerns?
- What was your experience of the process of identifying and accessing victims?
- Are you able to represent all the views and interests of your clients?
- How many victims do you represent? How often do you meet with the victims you represent?
- What are the major expectations of the victims that you represent? Do you think these expectations are realistic?
- What do you hope to achieve by representing victims? What do you expect will be the consequences of victim participation?
- Do you receive appropriate support for your work representing victims? Why (not)?

Concluding questions:

- Are there any issues that have not been discussed about your participation that are important to you?
- Do you have any questions or comments for us?



Annex 2: Agenda for workshop with victim organizations in Nairobi, conducted on 26 June 2014

1. General situation of victims

Open discussion with all participants

Discussion points:

- What are the greatest problems that victims face today as a consequence of the PEV and have there been significant changes over time?
- Who should be defined as being the victims of the PEV and are some victims more deserving of help by the ICC than others?
- What are the implications of the ICC distinguishing between participating victims and other victims?

2. Outreach and victims' knowledge of victim participation rules

Open discussion with all participants

Discussion points:

- To what extent have victims participated in ICC outreach activities and with what implications?
- How much do victims know about the ICC legal framework, in particular with regard to victim participation?
- To what extent and how have victims been able to follow the proceedings in the case in which they are participating?

3. Victims' perception of the participation regime

Open discussion with all participants

Discussion points:

- How have victims experienced the application process for participating in the ICC cases?
- Overall, has participating in the proceedings met the expectations and been meaningful for victims?
- Do victims consider the modes of participation established with the 3 October 2012 decision appropriate, and if not what alternatives are desired?
- Do victims believe that participation should be different at different stages of the proceedings?

4. Specific outcomes of participation

Open discussion with all participants

Discussion points:

1. What are the greatest advantages and challenges for victims participating in the ICC cases?
2. Do victims feel that participating in the ICC cases:
 - Empowers them, and that they have a voice in the proceedings?
 - Contributes to their healing?
 - Contributes to revealing the truth of what happened during the PEV crisis?
 - Means that justice has been served?
 - Is a form of reparation?
 - Contributes to reconciliation in communities affected by the PEV?
 - Affects their safety and security?

5. Victims' expectations and the future

Open discussion with all participants

Discussion points:

- What outcome of their participation are victims hoping for?
- Will the outcome of the criminal trials affect victims' opinion of participating in the ICC cases?
- Will the outcome of possible reparations hearings affect victims' opinion of participating in the ICC cases?
- Do victims feel that other initiatives for truth, justice or reparations are important (and possibly *more* important than participating in the ICC cases)?

6. Closing discussion

Open discussion with all participants

Discussion point:

- What constitutes 'justice' for victims, and will the ICC cases promote justice?

7. Facilitators' final remarks



Annex 3: Consent form for interviewees

I agree to be interviewed for the above-mentioned research project, *Promoting Active Victim Participation in Dealing with the Past and Transitional Justice*.

Date:

Location:

Other Information:

Name:

For any question relative to the research or to withdraw your consent at any time, you can communicate with [redacted]

Main objectives of the research:

The overall objective of the research project is to promote the active participation of local communities in transitional justice and impunity reduction by empowering victims to engage in processes for dealing with the past, and increasing the local ownership and impact of institutionalised mechanisms.

We are collecting information here in Kenya to learn more about people's perceptions of transitional justice in Kenya, specifically victims' participation in the ICC cases. The information collected will help us understand what is important in terms of participation in transitional justice processes, specifically the ICC cases, and will be used to write a research paper that will make recommendations on future processes of transitional justice. The research here in Kenya relating to the ICC is complemented by similar research relating to other transitional justice mechanisms in other countries, including Burundi, Cambodia, Guatemala and Honduras.

None of the researchers involved in the project are affiliated with the Government or the ICC (including the Prosecution and the Defence), and no information will be handed over to any such stakeholder or person acting on their behalf. The researchers on this project work for non-governmental organisations and have no direct interest in the outcome of the ICC cases, nor do they have any influence thereon.

Your participation in this study is voluntary and you will not receive any money or any other form of benefits if you decide to participate. You are free at any time to refuse to answer any question. You are free to stop the interview at any time. Refusing to answer or stopping the interview will not affect you in any way.

By agreeing to participate in this research, I understand:

- 1) That my participation involves a semi-structured interview about my views on transitional justice in Kenya, in particular victims participation in the ICC cases
- 2) That the information will only be used for the purposes of any publication following from this research, that my name will only be explicitly used if I agree to it, and that my identity will be protected if requested, and that I can change my decision regarding identification until pre-publication clearance. I prefer the following:
 - a. I am willing to be identified by name and title ☐
 - b. I am willing to be identified by generic title only ☐
 - c. I am unwilling to have my identity disclosed in any way ☐
- 3) That no information I disclose will be used in interviews with other participants in such a way as to allow them to identify the source of information.
- 4) That the interview notes will be kept in a secure environment and destroyed three years after the completion and publication of the research.
- 5) My participation in the project is voluntary. I can choose not to respond to specific questions. I can also decide to withdraw from the project until pre-publication clearance. If I do, it is up to me to decide whether any material provided to the project director can still be used for the purposes of the research.
- 6) Upon consideration, I freely agree to participate.

As the lead researcher in Kenya, I commit to fully respecting the wishes of the interviewee regarding informed consent.

[signed in front of interviewee by lead researcher and form kept on file with lead researcher]



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Impunity Watch is a Netherlands-based, international non-profit organisation seeking to promote accountability for atrocities in countries emerging from a violent past. IW conducts research into the root causes of impunity that includes the voices of affected communities to produce research-based policy advice on processes intended to enforce their rights to truth, justice, reparations and non-recurrence. IW works closely with civil society organisations to increase their influence on the creation and implementation of related policies. The present Research Report has been produced as part of a multi-year comparative project aimed at supporting and strengthening the participation of victims and affected communities in transitional justice processes. We thank the International Center for Policy and Conflict (ICPC) for their valuable assistance during the research process. We are grateful to the Oak Foundation and to Hivos for their financial assistance and continued support for our work.

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